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JAMES D. MAHER

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

THE WESTERN UNION TELEGRAPH COMPANY,
a Corporation,
Petitioner,

vs.

GEORGE M. BROWN, Executor of the Last Will and Testament of WILLIAM LANGE, JR., Deceased, and
J. U. HASTINGS,
Respondents.

REPLY BRIEF OF PETITIONER THE WESTERN UNION TELEGRAPH COMPANY.

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No. 159

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REPLY BRIEF OF PETITIONER, THE WESTERN UNION TELEGRAPH COMPANY.

We ask the permission of the court to make a short reply to respondents' brief.

I.

The Scope of the Inquiry.

Respondents' claim that the Circuit Court of Appeals was precluded from entering upon any inquiry into the sufficiency of the evidence to sup-

port the findings or a judgment in this case on the ground, it is stated, that at the close of the evidence no request was made for a judgment, citing the case of *Pennsylvania Casualty Co.* v. *Whitewaye*, 210 Fed. 782, and other cases, at page 12 of their brief. The authorities cited by counsel, however, related to the cases of general findings. In this case, which was tried by the court without a jury, special findings of fact were requested and made. This same objection, urged in the Circuit Court of Appeals, did not deter that court from giving consideration to the evidence in the cause. While it is the contention of the petitioner here that in several very material particulars the findings are not supported by the evidence, yet the chief basis of the appeal is that even under the special facts found by the court and admitted by the parties, the defendant below was entitled to judgment in its favor.

II.

The effect of the stipulations upon the message blank relating to the conditions under which messages are transmitted.

Since the brief of petitioner herein was filed, this court, on December 8, 1919, decided the case of *Postal Telegraph Co.* v. *Warren-Godwin Lumber Co.*, No. 91 of the present term, wherein the terms of a message contract similar to the one herein involved were considered. By that decision the court has disposed of many of the contentions of the respondents herein, whose brief was written before the decision was available. Counsel for respondents has reviewed the early decisions of many

of the courts which hold the provision of the message contract relating to unrepeated messages to be invalid and especially where the loss arose from delay rather than error in transmission. The point of the argument seems to be that the courts will determine the validity of these stipulations by ascertaining in each case whether such repetition of the message would have tended to avoid the loss. This court, in the Warren-Godwin case above referred to, reaffirmed its decision in the Primrose case, 154 U. S. 1, and has based its decision upon entirely different grounds, holding that the "condition" is one "appropriately adjusting the charge for the service rendered to the duty and responsibility exacted for its performance."

While this case before the court arose prior to the Act of Congress of June 18, 1910, by which it is held it was intended by Congress to assume control of the rates and rules and regulations of telegraph companies, it does not follow that this provision of the message contract was invalid prior to that date. The Act of Congress did not make valid a provision of a contract which theretofore was void. The effect of the Act of 1910, as construed by this court and the Interstate Commerce Commission and the other courts which have upheld it, is to make certain the fact that this stipulation of the message contract relating to the transmission of unrepeated messages, about which there has been so much controversy in the courts, is valid. It was so determined by this court in the Primrose case decided prior to the Act of Congress, and as said by the Interstate Commerce Commission in *Clay County Produce Co. v. Western Union Telegraph Co.*, 44 Int. Com. Rep. 670, approved by this court in the Warren-Godwin case, above cited:

> "From the very inception of the telegraph business or at least for a period of forty years before 1910, the unrepeated message was one sent under a limited rate and subject to a limited responsibility of the character of the one here in contest."

If, as held by this court in the Primrose case and the Warren-Godwin Lumber case, the provision of the message contract under consideration is a reasonable one adjusting the charge to the measure of the duty and responsibility, it applies alike to delay as to error in transmission, and we deem it unnecessary to enter upon a discussion of the various classes of telegraph messages and the conditions under which the stipulation would be valid, or attempt to review the manifold theories which counsel has advanced regarding the application of the stipulation to the different class of cases. We reassert here, however, that it appears from the record and the finding of the court that the message in question failed in transmission somewhere between Reno and Wabuska in the State of Nevada, which was an *intermediate point* in the course of the transmission. While under the true construction of this stipulation which we understand has been put upon it by this court it is not necessary to inquire whether the particular loss might have been avoided by the repetition of the message, it is apparent that the failure of the sending operater to have received the returned message would have been direct notice that it had miscarried. If the stipulations in question are now reasonable and valid conditions under the present Act of Congress which expressly approve the classification of messages which it had long been the custom of telegraph companies to make, the same conditions and stipulations were reasonable and valid at the time

the message in suit was sent. The diversity of judicial opinion with respect to these stipulations is pointed to by the Interstate Commerce Commission in the case above referred to of *Clay Co. Produce Co. v. Western Union Telegraph Co.*, and it is there stated that it is necessary to establish a fixed rule so that the transmitting of an interstate message may no longer involve a greater or less liability in one forum than it does in another. In view of the decision of this court in the Primrose case, which established the same rule the courts have applied to the stipulation since the Act of Congress of 1910, the decisions of the various courts holding that the stipulation is inapplicable in certain cases may no longer be cited as authority. The plaintiffs in the action, therefore, were not entitled to recover more than the amount designated in the stipulation, provided the message was sent subject to its written contract designating the conditions under which the message was to be transmitted and the measure of damage in case of loss. The plaintiff below testified that he did not order the message to be repeated.

III.

The alleged oral contract of insurance.

The record shows that the message was transmitted under the written agreement. The original message, marked "Plaintiff's Exhibit 3," was introduced in evidence by plaintiffs in the course of the trial. It reads (Trs. p. 83):

> "Send the following message subject to the terms on the back hereof which are hereby agreed to."

Then follows the message, signed by plaintiffs herein, and the terms and conditions upon which it was received by the company. Then the following proceeding occurred:

> "Mr. Hodghead (for defendant): I understand that if this message which is a contract and message combined, is offered, it is the entire contract which is introduced, including the stipulations upon the message blank.
>
> "Mr. Poorman (for plaintiffs) Yes, if they have any bearing on it" (Tr. p. 85).

It having been thus established that the message was sent subject to these written terms, which were agreed to, it was not competent for the court to find that any other oral contract defining a different liability or measure of damage was made. Respondents contend that the finding of the oral contract is conclusive upon the record here, which as stated at the outset is not true in view of the request for special findings; but if it were, the finding of the existence of an oral contract would be immaterial in view of the written agreement. If it were permissible here for the plaintiffs, notwithstanding their written contract, to show that the message was transmitted under an oral contract different in terms, then the message blanks upon which the multitude of messages are transmitted from day to day, which define the terms and conditions of transmission, may be superseded by any oral contract which the parties in interest might be able to establish over the evidence of the agent of the telegraph company, as was done in this case.

Respondents seem to feel that after they had stated to the agent of the company the purpose of their message the telegraph company thereafter in

some way became responsible for any loss arising from its non-delivery. It is urged that they put their whole case in the defendant's hands and that some exception should be made in this particular case and a different rule of law prevail. Nothing is more common than for users of the telegraph to make inquiry of receiving clerks or agents about the classes of messages and the safest method of transmission and to advise them of the urgency of the message. But aside from the notice of the business, the liability of the telegraph company, under its contract, is no greater in cases like the present one than in any other case. The telegraph company does not become an insurer of a message because the plaintiffs, as they state in this case, placed themselves in the defendant's hands. A uniform liability must prevail with respect to all messages of the same class, and the measure of that liability is found in the written terms of the contract.

IV.

Gross Negligence.

The finding of the court and respondents' argument that the negligence was gross were based upon the conclusion that the defendant wilfully delayed the delivery for the period of three days, which caused the alleged loss. In counsel's argument, found at page 80, defendant even seems to be charged with delay because the message was not delivered at night, although the receiving office did not open until seven o'clock on the following morning. The plaintiffs' notice to the agent was that the draft would be paid unless the message were delivered before banking hours the next morning. The

draft was actually received between 8:30 and 9:00 o'clock A. M. As the telephone office did not open until 7:00, the message could hardly ordinarily have been delivered before 7:30 A. M., and the delay therefore so far as the alleged loss was concerned, was from one to two hours. This is not gross negligence and was not found by the court to be gross negligence. But the court found that the delay of three days was gross negligence, which, however, had nothing to do with the loss, as the delay after the draft was received and paid was immaterial.

V.

Was the contract of plaintiffs with Pitt and Campbell for the purchase of the shares of stock an option only or was it an absolute agreement to buy the stock and pay the price agreed upon?

Among the authorities cited by the respondents, one only seems to have any application: that is the case of *Ramsey* v. *West*, decided by an intermediate court of appeal in Missouri. And yet the forfeiture clause of the contract under consideration in that case differed in a very material respect from the Lange and Hastings contract involved here, because in that case the parties were to be released upon default in payment, whereas we contend that no such interpretation can be put upon the Lange and Hastings contract, which seems clearly to provide, especially in view of the positive agreement to buy which is not found in option contracts, that the rights of the parties were to cease and determine, not when the purchasers made default, but when, after default, the sellers, abandon-

ing their right to enforce payment, retook the stock. That, we say, is the clear meaning of the words of the contract: "and *thereupon* all rights of each of the said parties shall forever cease and determine." The stock could not be returned "automatically" as counsel say. Pitt and Campbell had the right to demand its return because that right was given them by the law and the contract.

The quotation in counsel's brief from the case of *Beckwith-Anderson* v. *Allison*, 26 Cal. 473, is misleading. The court, by looking at page 474, where the terms of the contract are stated, will see that Davidson, the purchaser, never in any manner agreed to buy the property, and that none of the parties even contended that this contract with Davidson was anything more than an option.

In *Verestein* v. *Yeaney*, 210 Pa. 109, the court says (see p. 21 of counsel's brief) that under the terms of the agreement "they (the purchasers) are to be released from liability." As to the cases of:

Gordon v. *Swan*, 43 Cal. 564, and
Williamson v. *Hill*, 154 Mass. 117,

as stated in our former brief, page 36, there was no agreement to buy made by the purchasers, but the contract in each case was clearly one of option.

The Cases Contra.

On the other hand, the Supreme Court of the United States in the case of

Stewart v. *Griffith*, 217 U. S. 223.

in considering the effect of a forfeiture clause providing that upon non-payment the contract was to

be null and void and of no effect in law, gave controlling effect to the question whether the contract contained a clause *by which the purchasers had agreed to buy and pay the price named*, and held that where the contract so provided, instead of containing merely an agreement to sell upon the conditions specified, the agreement was absolute and payment could be enforced.

The supreme court of Pennsylvania took the same view in the case of

> *Weaver* v. *Griffith*, 210 Pa. 13 (see former brief, p. 32).

We agree that the correct rule is stated in

> 2 *Warvelle Vendors*, p. 818,

where it is said:

> "The right to declare a forfeiture is derived from the stipulation of the bond or agreement for conveyance, and is reserved ordinarily as an option on the part of the vendor, who upon failure of the vendee to comply with its terms may elect to declare the contract at an end."

But the fact is, the plaintiff in error in this case is not dependent upon the law of those cases, which do, however, state the prevailing rule, because, as above stated, the contract with Pitt and Campbell provided that the rights of the parties were not to cease upon default in payment, but upon return of the stock.

Counsel at the oral argument contended that the nature of the property which was the subject matter of the contract should be considered, from which they claimed it would appear the purchasers never contemplated that they were entering into

an agreement to buy. But if this were true, it was inadvisable to insert in the contract the absolute agreement to buy in the form in which it was stated.

Counsel further contend that the finding No. XVII, that Lange and Hastings abandoned the contract and forfeited the previous payment, was in effect a finding that Pitt and Campbell had taken back the stock. But this is not so. If we assume that the contract was an absolute agreement to buy and that the purchasers broke the contract and failed to make the payments, it would follow in any event that previous payments would be lost or forfeited. There would certainly be no way by which they could be recovered. Counsel cites from apt authority to show this in the case of

Glock v. *Howard*, 123 Cal. 1:

> "The law itself works the forfeiture of the money already paid on a contract such as that now under discussion even in the absence of the express provision therefor."

But if as stated we assume for the purpose of the argument that the contract is absolute, the finding that Lange and Hastings had abandoned it would not be a finding that Pitt and Campbell had abandoned it or surrendered their right to enforce a payment. There is nothing in the record to show that Pitt and Campbell ever asserted a claim or ever permitted the statute of limitations to run, or had or had not taken any action to enforce payment, or that they had received the stock. There is no finding nor evidence nor allegation that Pitt and Campbell ever surrendered their right to enforce the contract.

But if Pitt and Campbell had elected to retake

the stock, which is not shown, affirmatively or by inference, it could have made no difference in the case. The liability of the telegraph company was fixed or not at the time of the payment complained of on April 30th. The stock could not be returned until July 2nd, because there was no default in payment until that date. The claim on which this action was founded was made June 26, 1907, before there was any default, and before the stock could have been returned (Tr. p. 11, par. IX). The liability of the telegraph company cannot be made to depend upon the election of Pitt and Campbell at a subsequent time to accept the stock when under the terms of the contract they were not required to accept it. So the controversy reverts to the original question: Were Pitt and Campbell given the right by the terms of the contract to enforce the payment provided for therein?

VI.

The contract in question was not for a purchase of a mine but of corporate stock.

Respondents urge that in construing the Pitt and Campbell contract a different rule of construction prevails with relation to contracts for the purchase of mining property from that in contracts for the purchase of property of a different kind. But counsel has not met the fact that the Pitt and Campbell contract for the purchase of shares of stock and only that. There is nothing to show that the purchase of this stock gave plaintiffs the control of the corporation or the possession of any mine, or that the contract was contingent in any

way upon the success of a mining venture. Upon this point we repeat the argument found at pages 81-3 of our former brief.

VII.

Interest on the Claim.

Upon this point the respondent's have cited a number of authorities, but counsel has been frank to admit (p. 21) that none of them are precisely in point. This seems to be a sufficient reason why they need not be reviewed here. It may well be said that after the trial of the case the amount of plaintiffs' loss (assuming that there was a loss) was determined. But whether the amount of the draft represented the amount of the loss could not be ascertained until the trial and the findings of the court were made upon certain issues in the case. This is the reason the trial court refused the plaintiffs' claim for interest. Upon this point we have little to add to the argument stated at pages 87-90 of our opening brief. By the delay in the message the plaintiffs did not lose the opportunity to make a payment, but on the contrary the payment was made which they were trying to prevent, and their rights under the contract were thereby preserved. If, therefore, the shares of stock involved in the contract had been actually sold after this payment was made or were of a value in amount equal to or greater than the purchase price named in the contract, as plaintiffs undoubtedly supposed them to be, then there could not possibly have been any loss. This was a defense in the case and the court made a finding. The amount, therefore, of plaintiffs' loss could not be

ascertained until the trial of the case, and no interest should have been allowed.

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BRIEF ON BEHALF OF RESPONDENTS.

Samuel Poorman, Jr.,
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PRELIMINARY STATEMENT.

This cause is before the court on *certiorari* to the United States Circuit Court of Appeals for the Ninth Circuit.

Plaintiffs below* brought this action against defendant Telegraph Company (the petitioner

*—For convenience, the parties are herein referred to by their respective original designations. (All italics are our own.)

herein) to recover $11,250.00, with interest, as damages for delay in the transmission and delivery of a telegram. After judgment by the United States District Court in favor of plaintiffs for the principal of their demand, plaintiffs and defendant, respectively, sued writs of error out of the Circuit Court of Appeals for the Ninth Circuit. The latter court directed that said judgment be modified so as to include the interest prayed for, and that as so modified it be affirmed. (*Western Union Telegraph Company v. Lange*, 248 Fed. 656, 664.) Thereupon, upon defendant's petition for a writ of *certiorari*, the cause was brought before this court.

With great deference to counsel for defendant, we are impelled, by a divergence of view —natural as between opposing advocates—respecting the salient features of the case, to restate the facts as they appear from plaintiffs' standpoint.

STATEMENT OF THE CASE.

The action was brought to recover a loss suffered through defendant's *delay*, for three days, in the transmission and delivery of a telegram sent by plaintiffs from Oakland, California, to Lyon County Bank at Yerington, Nevada. This telegram was sent under a *special contract* by which defendant, *for an extra*

toll, INSURED its immediate transmission and delivery. [Findings X, XII, Tr., pp. 52-53, 56.] By it plaintiff sought to intercept and prevent the payment of a draft in the sum of $11,250 which had been previously mailed by them to said bank, for the purpose of meeting the second of seven installment payments under a contract, then in force between themselves and Messrs. Pitt and Campbell, for the purchase by plaintiffs of certain mining stock. [Findings VII-VIII, Tr., pp. 47-52.] That contract provided for an initial payment, which was made upon the execution thereof, and for the deposit in escrow with said bank of the stock in question under escrow instructions therein stipulated for. [Finding IV, Tr., pp. 43-46.] The deposit was accordingly made and the stock was thereafter held by the bank "in accordance with said contract and subject to such disposition as was required by said contract on the happening of any of the contingencies therein provided for." [Finding V, Tr., pp. 46-47.] The contract provided for deferred installment payments at sixty-day intervals on account of the purchase price of said stock—the first of which was to be made on or before May 1st, 1907—and further provided (as plaintiffs contend) that default in any payment should *automatically* effect the return of the stock by the bank to Pitt and Campbell, the

forfeiture of all moneys previously paid by plaintiffs, and the termination "of *all rights* of EACH of the parties" thereunder. [See clause "Third" thereof, Tr., pp. 45-46.]

The contract required payments to be made at the bank *in gold coin*,—the bank being thereby constituted the agent of Pitt and Campbell "for the purpose of receiving any and all payments to be made "*hereunder*." [Tr., p. 45.] Immediately after the execution of the contract, plaintiffs arranged with the bank that it should pay *in gold coin*, to Pitt and Campbell pursuant to the terms of the contract, the amount of any drafts they might send it. [Finding VI, Tr., p. 47.]

On April 27th, 1907, plaintiffs sent from Oakland, California, by registered mail, to the bank at Yerington, Nevada, a draft on San Francisco in the sum of $11,250, payable to the bank. This draft was sent for the purpose of meeting the May 1st payment under the Pitt and Campbell contract, and was received by the bank in due course of mail on April 30th, between 8:30 and 9 o'clock a. m. [Finding VII, Tr., pp. 47-48.] Thereafter on that day, the bank, pursuant to its arrangement with plaintiffs, paid over the amount thereof *in gold coin* to Pitt and Campbell, and later collected the amount of the draft from the drawee thereof. [Finding XVI, Tr., p. 59.]

On the afternoon of April 29th, the day before the amount of the draft was paid by the bank to Pitt and Campbell, plaintiffs were advised by the engineers who had examined the mine at their instance, that the property was valueless, and they thereupon determined to abandon the Pitt and Campbell contract and to notify the bank not to advance or pay any sum on the draft already sent. To that end, on that same evening they offered to defendants at Oakland, for immediate telegraphic transmission and delivery to the bank at Yerington, the following message: "Draft mailed you Saturday under mistake. Do not pay any sum to Pitt or Campbell. Return draft. Letter follows."

At the time they stated to defendant's agent "that it was *absolutely necessary* that said message be delivered to said bank * * * *before banking hours* on the following morning * * * and desired to know of said agent *in what manner* the said plaintiffs could be *absolutely assured* that said message would be so delivered." They explained the whole situation with regard to the subject matter of the message, including the extreme need for promptness, the terms of the Pitt and Campbell contract, and the amount of the loss that would be incurred if the message failed of such prompt delivery. They further disclosed to defendant's agent the facts

regarding the mailing of the draft, the time at which it would be delivered to the bank in due course of mail, and their information that the stock was valueless. They advised him that they had determined to make no further payments, and that the purpose of the message was to intercept payment by the bank of the amount of the draft as hereinbefore mentioned. Plaintiffs also stated that unless the telegram was transmitted and delivered before banking hours of the following morning, the bank would receive the draft and make payment of the amount thereof to Pitt and Campbell, in which event said amount would be wholly lost to themselves, since they purposed not to proceed under the contract.

Plaintiffs placed themselves wholly in defendant's hands as regards the steps to be taken in employing the latter's instrumentalities for their purpose, stating to its operator that they *desired to be advised* how the immediate transmission and delivery of their message might be *insured or guaranteed.* The operator represented to plaintiffs that defendant would INSURE the immediate delivery of said message if plaintiffs would pay defendant the sum of $1.45, which was *in excess* of defendant's *ordinary* tolls. Thereupon, plaintiffs accepted this proposal, delivered the message in writing to defendant, and paid it the sum mentioned. The

operator received such payment, wrote upon the message the words, "Deliver immediately," and simultaneously accepted said message on the terms indicated, and INSURED to plaintiffs such immediate transmission and delivery. [Finding VIII, Tr., pp. 48-52.]

Defendant did not, at the time, inform plaintiffs that its lines extended only to Wabuska, or that beyond that point the message would have to be transmitted over a connecting telephone line. [Finding IX, Tr., p. 52.]

The court found that the charge paid by plaintiffs "was so paid and was by defendant accepted in consideration of the agreement and undertaking by defendant immediately to transmit and immediately to deliver said message in *such manner* and under *such classification* as. *pursuant to the rules and regulations of defendant,* was required in order that defendant would *insure* to plaintiffs such immediate transmission and immediate delivery thereof to said Lyon County Bank." [Finding X, Tr., p. 53.] Nevertheless, said message was not repeated by defendant in the manner provided in the stipulations on the message blank. [Finding XII, Tr., p. 56.]

Defendant did not promptly transmit said message to Wabuska, its terminus, on the evening of April 29th, nor did it promptly deliver the same to the Yerington Electric Company

(which operated the connecting telephone line), for further transmission by telephone to Yerington, but, on the contrary, wholly failed to transmit said messages to Wabuska or to deliver it to Yerington Electric Company until May 2nd. This delay occurred wholly on the lines of the telegraph of defendant. [Finding XV, Tr., p. 58.]

If defendant had, with reasonable promptness, transmitted and delivered said message to the bank, the same would have reached the bank before it had received the draft; and if the bank had received the message before receiving the draft, it would not have advanced or paid any amount thereon. However, the bank, as above stated, received the draft between 8:30 and 9 o'clock a. m. on April 30th, and thereafter on that day paid the amount thereof *in gold coin* to Pitt and Campbell, without any knowledge of plaintiffs' desire to withhold payment. [Finding XVI, Tr., pp. 59-60.] Plaintiffs did not make any further payment on the contract, but abandoned the same and forfeited all moneys paid thereon. [Finding XVII, Tr., p. 60.]

On April 29th, 1907, and at all times thereafter, said mining stock was practically valueless. [Finding XVIII, Tr., p. 60.] By reason of what the court found to be "defendant's *gross negligence*" in delaying the transmission

and delivery of said message until May 2nd [Finding XVI, Tr., p. 59], plaintiffs suffered a loss in the amount of the draft [Finding XX, Tr., p. 61]; and, after making written claim therefor within sixty days, as required by the stipulation on the message blank [Finding XIX, Tr., pp. 60-61, brought this action to recover the same.

From Wabuska to Yerington, a distance of eleven miles [Finding XIV, Tr., p. 58], the only means for the electrical transmission of messages was the telephone line of the Yerington Electric Company. This company and defendant had an arrangement for the interchange of business, each charging its own tolls on a message sent over both lines. Each company employed the railroad agent at Wabuska to handle its business and each maintained its office there in the railway station, the telegraph and telephone instruments being within a few feet of each other. [Finding XIII, Tr., pp. 56-58.]

The Scope of the Inquiry Herein.

At the close of the evidence, defendant made no request "for a ruling thereon," no "motion for judgment," nor any "motion to present to the court the issue of law so involved." (*Pennsylvania Casualty Co. v. Whiteway*, 210 Fed. 782, 784.) Therefore, under sections 649, 700

and 1011 of the Revised Statutes of the United States, the Circuit Court of Appeals was precluded herein from entering upon any inquiry into the sufficiency of the evidence to support the special findings or the judgment. See, on this head,

> *Mercantile Trust Co. v. Wood*, 60 Fed. 346, 348;
>
> *Citizens Bank v. Farwell*, 63 Fed 117;
>
> *Wear v. Imperial Window Glass Co.*, 224 Fed. 60, 62, 63;
>
> *Maryland, etc. Co. v. Orchard Land & Timber Co.*, 240 Fed. 364.

However, counsel would seem to seek to have this court review the evidence herein to determine whether it was sufficient to sustain the finding that the delay complained of was the result of defendant's *gross negligence*, and also the finding that defendant entered into a *special contract*, distinct from the stipulations on the message blank, whereby it insured to plaintiffs the immediate transmission and delivery of their telegram. But clearly, the present inquiry is confined to the question of law whether the findings support the judgment. By section 1011 of the Revised Statutes, it is provided that "there shall be no reversal in the Supreme Court * * * upon a writ of error, * * * for any error in fact;" and by section

240 of the Judicial Code, in any case before it on *certiorari*, this court's power and authority is the same "as if it [the case] had been carried by appeal or writ of error to the Supreme Court."

The Points Made by Petitioner Herein.

Petitioner contends:

First. That the trial court erred in finding that the message was transmitted under an *oral* contract of insurance against loss or damage from *delay* in transmission or delivery, for the reason that the message was written upon one of defendant's message blanks containing a stipulation providing that "*correctness* in the transmission * * * can be insured by contract in *writing.*" [Petitioner's brief, pp. 25-32.]

Second. That the written stipulations upon the message blank limiting the liability of defendant for defaults with respect to *unrepeated* messages to the amount received for sending the same, and with respect to *repeated* messages to fifty times that amount, are valid and conclusive of the rights of plaintiffs. [Petitioner's brief, pp. 33-56.]

Third. That the trial court erred in finding that defendant was guilty of *gross negligence* in the transmission and delivery of the message. [Petitioner's brief, pp. 56-61.]

Fourth. That plaintiffs suffered no damage by the delay of their message, for the reason that their contract with Messrs. Pitt and Campbell was an *absolute* contract to purchase,—and not a mere *option* to purchase,—the shares of stock constituting the subject-matter thereof. [Petitioner's brief, pp. 62-86.]

Fifth: That plaintiffs were not entitled to *interest* upon the principal amount of their demand herein, for the reason that, until judgment, said demand was unliquidated. [Petitioner's brief, pp. 87-90.]

BRIEF OF THE ARGUMENT ON BEHALF OF RESPONDENTS.

Points of Law and Fact.

In answer to defendant's attack upon the judgment herein, plaintiffs maintain,—

(a) That the *stipulations* on the message blank do *not* operate to relieve the company from liability for its negligence; and then, assuming that this proposition be established, *either*

(b) That under the forfeiture clause of the Pitt and Campbell contract, plaintiffs had the *option* to withhold the May 1st installment and thereby *forfeit* the previous payment and terminate "*all* rights of *each* of the parties" thereunder; or, failing such option in plaintiffs,

(c) That the fact as found is that Pitt and Campbell *exercised the option,* which defendant contends *they alone had* under such forfeiture clause, by electing to *take back their stock* and to terminate the contract.

As an incident to plaintiffs' right to recover the principal of their demand, they further maintain,—

(d) That said demand was of such a character as to entitle them to *interest* thereon, and that the judgment was properly modified to include the same.

Accordingly, the following points are made in this brief on behalf of plaintiffs, to-wit:

I. The finding that the special contract of insurance was the one actually entered into, is conclusive; but in any event, as plaintiffs, in ignorance of the terms of the message blank, put their whole case in defendant's hands and abided by its directions respecting the manner in which the message should be sent to conform to its rules, defendant cannot escape liability if, in following such directions, plaintiffs omitted some formality required by the printed stipulations.

II. The stipulations on the message blank do not, as properly construed, relieve defendant from liability for its negligent delay herein, even if no *gross negligence* were imputed to it by the trial court's findings.

(a) The stipulation prescribing the mode in which the special insurance of messages may be effected, does not require a contract *in writing* except where the insurance is against *errors in transmission*, and, accordingly, there is no inhibition upon the *verbal* insurance against *delays* by the court found to have been effected.

(b) Even if,—contrary to the facts as found,—the message had not been sent under a special contract of insurance for an extra toll, the stipulation of non-liability for unrepeated messages could not operate to exonerate defendant, for compliance with its terms would have *no tendency to prevent delays* arising from *general* causes, but would conduce only to the *correction of errors* in transmission and, therefore, only to the avoidance of *delays chargeable to such errors*. Here, the message was, in all respects, correctly transmitted, the delay being due to its total disappearance for three days while in transit.

(c) The stipulation of non-liability for messages forwarded over connecting lines is not in conflict with the special contract of insurance and has no application to the case at bar, (1) because it contemplates exemption only for defaults chargeable to the connecting line, and not, as here, for a delay occurring *wholly upon the defendant's own lines;* (2) because it has reference only to connecting *telegraph*—as dis-

tinguished from *telephone*—lines; (3) because it comprehends only those *casual* instances in which defendant finds it necessary to forward over a connecting line,—not to the case of a *standing agreement* for the forwarding over a certain line of *all* messages for a given destination; and (4) because it does not inhibit the making of a *special agreement* to deliver beyond defendant's terminus.

III. The finding that the delay complained of was the result of defendant's *gross negligence,* is conclusive; and no stipulation can exempt it from liability for the consequences thereof.

IV. The Pitt and Campbell contract left it to plaintiffs' *option* to withhold the May 1st installment and thereby forfeit the previous payment and terminate "*all* rights of *each* of the parties" thereunder.

V. Apart from the question of the *construction* of the Pitt and Campbell contract, the court's finding that plaintiffs made *no further payments* thereunder but abandoned the same and *forfeited all moneys paid thereon,* constitutes a finding that Pitt and Campbell exercised *their* right of election (if any),—not by enforcing the contract,—but *by declaring a forfeiture and taking back their stock.*

VI. The judgment herein, as modified, properly includes interest from the date of plaintiffs'

claim of loss, (a) because the damages claimed, namely, the amount of the draft, constituted a *liquidated demand;* and (b) because even if the demand herein were unliquidated, defendant's repudiation of *all* liability would render inapplicable the general rule denying interest thereon.

I.

The Finding That the Special Contract of Insurance Was the One Actually Entered Into, Is Conclusive; but in Any Event, as Plaintiffs, in Ignorance of the Terms of the Message Blank, Put Their Whole Case in Defendant's Hands and Abided by Its Directions Respecting the Manner in Which the Message Should Be Sent to Conform to Its Rules, Defendant Cannot Escape Liability If, in Following Such Directions, Plaintiffs Omitted Some Formality Required by the Printed Stipulations.

Under the facts found, counsel's argument on the points based on the stipulations on the telegraph blank, is, for the most part, entirely beside the mark. It is not to be lost sight of that plaintiffs went to the telegraph office; explained to defendant's agent in charge just what their difficulty was and what they desired to do; and, after putting the case fully before

him, asked what steps they would have to take "in order to INSURE the immediate delivery" of their message to the addressee. They put themselves wholly on defendant's hands; complied exactly with the instructions given them by the agent; paid all charges (*including an* EXTRA *fee*) asked of them; and saw defendant's agent write the words "deliver immediately" on the message,—by which words was evidence precisely what they had agreed and paid *extra* for. [Finding VIII, Tr., pp. 48-52.] It hardly lies in defendant's mouth under these circumstances, not only to assert that the stipulations should be warped from their natural meaning to cover this case (a thing that we shall show to be necessary to make them at all applicable thereto), but, supposing them to be strictly applicable, to invoke them in order to take advantage of the ignorance, incompetence, negligence, or wilful misrepresentation and extortion of its agent.

A telegraph company can do business with the public only through its agents, and on them the public must absolutely rely for information as to the manner in which such business shall be transacted. When the sender of a message states to such an agent just what he wishes to accomplish through the company's public facilities; and, putting himself wholly in the company's hands, asks what steps he must take to effect what he wishes, making no condition

or restriction whatever as to cost or charge; and then, being advised in this regard, does *exactly* as he is told and in the *precise mode* pointed out to him,—he should, in strict justice, be permitted to rely on the contract thus made even when its formalities do not come within the strict letter of the company's regulations. By the company's act, he is put off his guard and contracts in full confidence that the forms adopted answer to the company's rules. The *onus* of seeing to the observance thereof is in such case shifted to, and accepted by, the company, and its failure in a matter as to which it has special knowledge of the highest character, should be borne by it and not by the sender.

The essence of the employment of the telegraph, as a means of communication, is speed; and to require the sender to go through the company's regulations to check up and determine the correctness of the representations of the company's agent as to the mode of employing the principal in any particular instance (especially when a free hand, so to speak, is given the agent by the sender), would be unreasonable in that it would defeat the very purpose of that employment. And when all this had been done by the sender, he would still have to seek—as we have been here compelled to seek,—a court's interpretation of those regu-

lations and its determination as to whether he had brought his case precisely within their terms.

In this connection, the oral opinion of the learned trial court, rendered in announcing his decision herein, is illuminative. Judge Van Fleet then said, in part:

"So far as concerns the defense that the company is excused by reason of the failure of the plaintiffs to have the message repeated, assuming that the company could contract against its gross negligence, which I doubt, my view is this: Here are persons going to a telegraph office, unfamiliar, as most of us are, with the exact character of the rules and regulations governing the transmission of telegrams; they hand in a message to the agent, inform him of its importance, and submit to him the question as to what means shall be adopted to insure the prompt and efficient transmission of that message, and the agent undertakes to inform them as to that method, and they conform to his instructions, and pay such increased toll,—in this instance substantially, if not precisely, what they would have been required to pay for a repeated message, some few cents one way or the other. Now, under such circumstances, it seems to me that it does not lie with the company to say that they are excused because of the mere formal insufficiency of that arrangement, which was suggested by their own agent. I think that the court is entitled to hold that it was in substance and effect a contract for the immediate transmission and the repetition of that message, if that was deemed by its agent the best method of insuring its prompt delivery. In other words,

I think that it was in effect a contract of insurance for the immediate delivery of this message. It is true, the agent testified that what was said to him about the importance of the message 'went in one ear and out the other; he did not pay any attention to it.' Certainly, if corporations of this character employ people whose mental and physical makeup is such that important instructions may pass in one ear and out the other, with nothing to interrupt such passage, the responsibility for that defect should not rest upon the patron; it should rest where it belongs, with those who employ the agent; and, therefore, I am unable to sustain that defense." [Tr., pp. 163-164.]

But it is insisted on behalf of defendant that the terms of the message blank constitute a written contract whereunder, in point of fact, the message was sent, and that this written contract must be brushed aside if effect be given to the verbal contract of insurance. [Petitioner's brief, p. 29.] Plaintiffs might very well content themselves with answering that the verbal contract is the one found by the trial court to have been actually entered into, and that even if such finding were erroneous, "it cannot be held to be an error of law," (*Jefferies v. Mutual Life Ins. Co.,* 110 U. S. 305), for which alone can a reversal be had in this court. (Rev. Stats. Sec. 1011.) It might even be argued by plaintiffs that, as there is no explicit finding that the special contract of insurance was merely oral, it will be presumed, in support of

the judgment, that such contract was in writing. However, plaintiffs are under no necessity of confining themselves to these propositions.

As will be seen in the next succeeding subdivision of this brief, the stipulations on the message blank, as properly construed, not only do not inhibit, and are not in conflict with, the verbal contract of insurance found by the court, but, by necessary implication, they contemplate such verbal contracts in cases in which the insurance is against *delays* as distinguished from *errors* in transmission. Apart from this, however, in all cases in which it is sought by a public service corporation to bind a person dealing with it by the terms appearing on a message blank, a ticket, a bill of lading, or a receipt, the question primarily to be determined is whether or not the instrument relied upon does, *in reality, constitute the contract* between the parties. If there be a meeting of the minds in an oral understanding,—the attention of the patron not being specifically directed to the terms of the writing and he being ignorant of any conflict between them and the bargain verbally concluded,—it is universally held that the latter constitutes the real contract and that it would operate as a fraud and deceit upon him to measure his rights by the terms of a writing which he was justly entitled to regard either as merely evidentiary of the actual understand-

ing or, at least, as not in conflict therewith. Accordingly, in the case of *Mobile & Montgomery Ry. Co. v. Jurey*, 111 U. S. 584, where it was similarly urged that when a carrier gives a shipper a bill of lading, no parol evidence can be received to vary its printed terms, this court said:

> "Before this rule can be applied, the contract in writing *must be shown to be the contract of the parties.*"
>
> 111 U. S. 591.

Defendant in the case at bar failed signally to make the showing that would have precluded the introduction of evidence of the verbal contract of insurance. The trial court found such a contract to have been made, and although defendant cannot now attack that finding, it may with propriety be pointed out that, under the evidence, no other finding was possible. Plaintiffs came to defendant's Oakland office with their message already written out on one of the company's blanks. [Tr., p. 81.] They did not tender the message in that form for transmission, but requested to be advised by the receiving clerk how they should proceed in order to have defendant insure the immediate transmission and delivery of the same. [Tr., pp. 100-101.] In other words, they indicated unequivocally to defendant's agent that the form of contract usually assented to in silence by the

senders of telegrams, did not suit their needs and was *not* to be regarded as receiving *their* assent. They demanded something more particularly calculated to safeguard their interests. [Tr., pp. 80, 97-98, 100-101.] Quinn, the agent, did not make the slightest pretense that he could not, for lack of authority or otherwise, contract in terms other than, or in addition to, those appearing on the message blank. On the contrary, after first assuring himself that the lines to Yerington were in working order, he undertook to point out to plaintiffs a special mode of contracting for the insurance of promptness, and this mode was in all respects adopted by them. [Tr., pp. 80, 101-102.] It embraced

(a) The addition to the message of the direction, "Deliver immediately," written thereon by Quinn himself;

(b) A charge of the company's ordinary rate, plus the connecting telephone line's ordinary rate, for the whole message (including these additional words);

(c) A charge of an *extra half-rate* based on both ordinary rates for the whole message (including the added words).

It therefore appears that defendant *did* receive a consideration for the insurance of the message in addition to its repeated message toll. Of course, plaintiffs were not advised respect-

ing the items going to make up the aggregate charge, but they did know that they were paying an extra rate. When, conforming themselves to Quinn's instructions, they paid the additional rate and handed him the message as previously written out by them on defendant's message blank, there could have been no question in the minds of either of the parties but that the message was to be sent under the verbal contract of insurance.

In the ordinary case involving the controlling force of the stipulations appearing on a message blank, ticket, or bill of lading, some sort of assent is given to the written terms *after* the conclusion of the oral negotiations. Here plaintiffs, *ab initio*, rejected the company's ordinary form of contract as not answering to their requirements, and demanded the assumption of a different degree of responsibility on its part. Hence neither of the parties can be regarded as looking upon the printed stipulations in the light of the formal embodiment of the terms orally agreed upon. If, after bargaining, the two parties to a contract in any manner adopt a writing dealing with the subject-matter of their negotiations, they must, in the absence of anything savoring of fraud or deceit, be regarded as having intended that writing to embrace, and to have merged in it, all of the matters upon which they have agreed. But

when such adoption is expressly withheld,—even though the same paper on which the printed stipulations appear may be used for the purpose of setting forth the message to be transmitted under special and different terms,—*the printed matter is not the contract of the parties* and the verbal understanding can alone be looked to.

Even where there is no express rejection of the terms of the writing at the time of entering into the contract, the mere circumstance that a distinctly different oral agreement is made, precludes the possibility of the writing being the contract actually entered into; and this is true even where the acts relied upon as an adoption of the writing are done subsequent to the conclusion of the oral negotiations. The public service corporation which, in such cases, is always the party relying upon the writing, is the one who has been the draughtsman and who is familiar with its terms and meaning. Usually, the other party (as was found to be the fact here), is wholly ignorant of those terms. In any event, in case of doubt, he relies upon the corporation's interpretation of its own regulations. He is not on an equal footing with the corporation in this regard, and his necessities place him under a very real form of compulsion in acceding to whatever it demands or suggests. Hence, as has been seen, the appar-

ent merger of the oral negotiations in the writing is always susceptible of being negatived by a showing of circumstances that point to those negotiations, rather than to the writing, as constituting the real contract. When such a showing is made, any contradiction or inconsistency is resolved against the party who, despite the verbal understanding, has supplied an instrument at variance therewith. The obvious violation of the duty of fair dealing imposed upon the corporation, requires the application of such a rule.

This exception to the general rule that the written stipulations are binding upon the person dealing with the company, whether or not he has read them, is thus declared in 1 *Elliott on Contracts*, section 53:

> "In the first place the nature of transactions may be such that the person accepting the ticket, bill of lading or the like may believe, and justly so, that it contains no terms *other than those already agreed upon* and that it is merely an acknowledgment thereof *not intended to introduce any special terms*. * * * So, ordinarily, when a shipper is given a bill of lading which embodies terms *different* from those *orally* agreed upon, *he is not bound thereby*." [Citing numerous cases.]

Of course, even if the stipulation to the effect that "no employee of the company is authorized to vary the foregoing," were suscept-

ible of a construction making it applicable to anything but the *rates* of insurance of *correctness* in transmission,—which we deny,—what has been already said in support of the contention that the verbal agreement,—and not the terms of the message blank,—constitutes the real contract between the parties, is at least equally demonstrative of the fallacy of any argument based on this stipulation. Regarded as a notice, it fails of binding force because not brought home to plaintiffs; while, on the other hand, it cannot be one of the terms of the contract between the parties for the reason that plaintiffs were necessarily misled into the belief that the mode of contracting suggested by defendant's agent in answer to their inquiry upon the subject, was one authorized by its regulations and binding upon it.

To counsel for defendant, it has seemed that the written stipulations and the oral contract of insurance concerned the same matter, namely, the measure of damages for delays in transmission and delivery. [Petitioner's brief, p. 29.] This, however, ignores the fact that the message was not sent either (a) as an *un*repeated message, or (b) as a *simple* repeated message, or (c) as a message whereof *correctness* in transmission was insured. The stipulations specify a measure of damages for the defaults of defendant with respect to each one of these

classes of messages. But as for (d) messages "specially insured" against *delays*,—while the stipulations expressly recognize this type of insurance as one which the company is willing to undertake, no corresponding measure of damages is therein specified. That is to say,—the subject-matter of insurance against *delays* is not dealt with in or by the stipulations, except only in so far as it is accorded the recognition referred to. Neither the *rate* to be paid for this class of insurance, nor the necessity for a *written contract* with respect thereto, is even hinted at in the message blanks. It having been found that the message *had* been "specially *insured*" against *delays*, the written stipulations respecting damages became wholly inapplicable,—as much so as though the message had been written on a blank sheet of paper.

II.

The Stipulations on the Message Blank Do Not, as Properly Construed, Relieve Defendant From Liability for Its Negligent Delay Herein, Even If No Gross Negligence Were Imputed to It by the Court's Findings.

(a) The Stipulation Prescribing the Mode in Which the Special Insurance of Messages May be Effected, Does Not Require a Contract in Writing Except Where the Insurance is Against Errors in Transmission, and, Accordingly, There is No Inhibition Upon Verbal Insurance Against Delays.

The stipulation on defendant's message blanks respecting the *insurance* of messages, is in part as follows:

"*Correctness* in the *transmission* of the message to any point on the lines of this company can be insured *by contract in writing*, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz., one per cent., for any distance not exceeding 1,000 miles, and two per cent., for any greater distance. No employee of the company is authorized to vary the foregoing." [Tr., pp. 55-56.]

This portion of said stipulation defendant invokes to relieve it from liability under the spe-

cial contract of insurance against *delay* in delivery upon which plaintiffs rely,—the argument being that, by its terms, all *oral* contracts of insurance against *any character of default whatsoever* on defendant's part, are inhibited. However, this is not the sole provision on the subject of insurance contained in the stipulations on the message blanks. Insurance of messages against *delays* is dealt with in an earlier clause thereof; and upon a consideration of those stipulations as a whole, it will become apparent that no *mode* is prescribed for the effecting of valid contracts of insurance against *delay*, and hence that an *oral* contract insuring promptness is binding upon defendant.

Provision for the 'special insurance' of messages against *delays*—as distinguished from *mistakes*—is made in that paragraph of the stipulations printed on the back of defendant's message blanks which immediately precedes the clause above quoted and whereof the subject matter is the insurance of "*correctness* in the transmission." The paragraph referred to is as follows:

"To guard against mistakes or delays, the sender of a message should order it REPEATED: that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be

liable for mistakes or *delays* in the transmission or delivery, or for non-delivery of any unrepeated message, beyond the amount received for sending the same; nor for mistakes or *delays* in the transmission or delivery, or for non-delivery of any repeated message, beyond fifty times the sum received for sending the same, *unless specially insured*, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination." [Tr. p. 54.]

Taking the terms of these stipulations together, they constitute a classification by defendant telegraph company of all messages transmitted by it under three general heads, as follows:

1st. *Unrepeated* messages;

2nd. *Repeated* messages;

3rd. Messages *"specially insured"* against "mistakes or *delays* in transmission or delivery" or against "non-delivery."

Of this last class of messages, those in which "*correctness* in transmission" is to be insured, must be "insured by contract *in writing*," and, for *such* insurance, premium must be paid at the rates specified on the blank.

The provision requiring a writing, together with that prescribing special insurance premium rates, applies only to messages *correctness* in

the transmission of which is insured. The gist of the present action is *delay*,—not mistake. Therefore, there is nothing in the terms printed on the telegraph blank inconsistent with plaintiffs' right to effect, in the manner found by the trial court, an insurance of *immediate* transmission and delivery in consideration of the payment of a rate in excess of defendant's regular charge for ordinary, *i. e.*, *un*repeated messages. [Findings VIII, X, XII; Tr. pp. 51-53, 56.] Nor is there anything inconsistent with those terms in the fact that the rate paid by plaintiffs was less than the sum that would have been necessary to meet defendant's premium charge if plaintiffs had been seeking,—what they were *not* seeking,—insurance of *correctness* in transmission.

To elaborate: It appears that defendant does insure both *correctness* of transmission and delivery and also *promptness* therein. To insure "*correctness* in transmission," defendant specifically requires "a contract *in writing*" and payment of a premium at the rate set forth. Therefore it follows, by necessary implication, that to insure *prompt* transmission and delivery any form of contract is sufficient, since there is no special requirement of a writing, or other formality, for this case. And it is to be noted that as no premium rate is stipulated for *this* class of insurance, the last sentence of the para-

graph specifying the rates for insurance of *correctness,*—to-wit, "No employee of the company is authorized to *vary* the foregoing."—is wholly inapplicable to the case at bar.

Counsel attach considerable importance to the fact that the additional charge exacted by defendant for the insurance of *promptness,* was only 47 cents; while to have insured *correctness* in transmission, the premium would have been $112.50 if the agreed amount of risk had corresponded with the face of the draft sought to be intercepted. [Petitioner's Brief, pp. 26, 31.] However small the charge actually made, it was the precise sum that defendant saw fit to name for undertaking to indemnify plaintiffs for the consequences of any delay on its part. Plaintiffs had no means of determining whether it was within the authority of defendant's receiving clerk to contract for such indemnity for a small or for a large fee. The message blank gave no information on this head. While the stipulations provide for an extra half-rate for repeated messages, not a word appears therein touching at all the matter of a charge for that "special insurance" against delays that we have seen to be contemplated by their terms.

Moreover, plaintiffs were not charged, in separate items, 98 cents for the transmission of the message and 47 cents for its insurance against delays. On the contrary, defendant

named an aggregate sum of $1.45 for the entire service and undertaking sought, and plaintiffs were told merely that this was *in excess* of the regular rate, without any information being furnished as to how much in excess thereof that sum was. Hence, for all that appeared to them, the charge of $1.45 might have been made up of three items,—one for the *transmission* of the message, another for its *repetition*, and a third for its *insurance*. If, contrary to the findings, plaintiffs had read or had otherwise been advised of the terms of the message blank, they would have received no information on this head. The fact that premium rates for the insurance of *correctness* are thereon specified, while nothing is said on the subject of premium or special charge of any kind for the insurance of *promptness*, would lead to the inference that nothing was requisite, beyond the repetition charge, in order to effect the latter class of insurance, *except notification* to the company that the message was offered for transmission and delivery as one "specially insured" against *delay*. The fact that a rate of charge is specified for insurance of *correctness* furnishes no ground for an implication that an *identical*, or even any other *special*, rate is established for insuring against a wholly different kind of default on the company's part. It might very well be that defendant was will-

ing to make special efforts to secure *promptness* in the transmission and delivery of a message, without any charge beyond that for a repeated message, in a case in which it assumed no responsibility as an insurer of *correctness* and, accordingly, might safely omit,—as it did in fact here omit,—to perform what we shall later see to be the vain act of repetition.

But the all-sufficient answer to the argument based on the amount of the tolls is that defendant—not plaintiffs—fixed a flat rate for the service and indemnity specially contracted for; that such amount was in excess of the regular charge for such a message; and that it was paid by plaintiffs after they had put themselves entirely in defendant's hands in that regard, without any notice that they could have gained from the message blank whether or not it corresponded with the charge usually exacted by the company for insuring promptness.

Apart from all this, however, the testimony adduced by defendant demonstrates the insincerity of its present contention that the message blanks specify any rate of charge for the insurance of promptness. The witness Quinn was in charge of defendant's Oakland office, as receiving clerk, at the time plaintiffs presented themselves thereat for the purpose of having forwarded the message here in question. [Tr. p. 132.] His testimony on this as on all other

points, is enlightening. He declared that the company *did not insure messages at all*,—that he *would not have accepted* any message whereof prompt transmission and delivery was sought to be *insured*. [Tr. p. 146.] Yet he admitted thorough familiarity with the stipulations on the message blank. [Tr. p. 146.] There are two possible inferences to be drawn from this evidence. Not only must the insurance stipulation have been regarded by defendant and its agents as a ~~mere~~ subterfuge designed merely to furnish defendant means of escape from the consequences of its own failure to perform its legal obligation with respect to messages entrusted to it,—and not to afford the sender indemnity in any case in which he may choose to pay therefor; but, in addition, the exorbitancy of the only rate for insurance prescribed, namely, that for insuring correctness, must have been considered effectual to prevent patrons from applying for the indemnity ostensibly contemplated by the stipulation. That such rate *was*, in fact, prohibitive is apparent from the same witness's further testimony. Not only had he never insured a message or had one offered for insurance [Tr. p. 141], notwithstanding he was stationed at defendant's main office in a large city, but if one had been so offered he would have declined to accept it on *any* terms as an *insured* message, no matter

what premium had been tendered. [Tr. pp. 146-147.]

Whether defendant or the Interstate Commerce Commission be responsible therefor, we are unable to say, but it is significant that, at the time of the Commission's decision in the case of *Cultra v. Western Union Tel. Co.*, 44 I. C. C. 679 (relied upon by defendant), the graded insurance rate specified upon defendant's message blanks had been cut from *one* per cent for distances not exceeding 1000 miles, and *two* per cent for greater distances, to a flat rate of *one-tenth of one per cent.* If, in May, 1917, and (as stated by the Commission) "for a long time" prior thereto, defendant could afford to insure messages for one-tenth of one per cent, notwithstanding the notorious increase in its costs of operation in recent years, is it possible to justify as reasonable or even as bearing the slightest relation to the risk incurred or the service rendered, a charge either of ten or twenty times that rate for the assumption of the identical liability in April, 1907?

(b) Even If,—Contrary to the Facts as Found,—the Message Had Not Been Sent Under a Special Contract of Insurance for an Extra Toll, the Stipulation of Non-Liability for Unrepeated Messages Could Not Operate to Exonerate Defendant, for Compliance With Its Terms Would Have No Tendency to Prevent Delays Arising From General Causes, but Would Conduce Only to the Correction of Errors in Transmission and, Therefore, Only to the Avoidance of Delays Chargeable to Such Errors.

Even if there were not present in this case the unique feature of a special contract of insurance against delays and the payment of an extra charge as the consideration therefor, still plaintiffs, on a proper construction and application of the repeated message clause of the stipulations on the message blank, would be entitled to recover. It will be remembered, for the purposes of the present discussion, that the message as first transmitted and delivered, three days after it had been sent, was *correct in verbiage,* address and all. With that fact in mind, reference should again be had to the precise terms of the stipulation of non-liability for unrepeated messages. They are as follows:

"To guard against *mistakes or delays,** the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for *mistakes or delays* in the transmission or delivery, or for non-delivery of any unrepeated message, beyond the amount received for sending the same; * * *" [Tr. p. 54.]

For the purposes of the argument on this head, it will be assumed,—contrary to the fact as found [Tr., pp. 53, 56],—that the entering into the special contract of insurance did not embrace an undertaking on defendant's part to repeat the message. It should be observed, however, in passing, that as the stipulations on the message blank provide ~~duly~~ for the insurance only of *repeated* messages, plaintiffs' direction that their telegram be sent as an *insured* message necessarily embraced an order for its repetition, or for anything else that defendant's rules might require.

The purpose of the stipulation requiring the repetition of messages is by its own terms declared to be, "to guard against mistakes or *delays*"; and the repetition is thereby defined as a "telegraphing back to the originating office *for comparison*." The case at bar arises *not* out of a *mistake* in transmission, but out of *delay* in transmission and delivery, whereby the

message entrusted to defendant did not reac the addressee for three days, and accordingl failed of its purpose. Now, the only *delay* tha could possibly be prevented or lessened by *repetition and comparison* of the message, i obviously such a delay as would result fron mistake in the transmission of the name o address of the addressee. Repetition itsel takes as much time as the original transmissio of the message, and if no mistake in the addres is thereby discovered and corrected, the very ac of repeating tends to delay rather than to ex pedition. In the case at bar, the message— address and all—was correctly transmitted, an therefore the delay complained of was in no wa connected with the failure—even had there bee such a failure—to have the message repeated.

A corporation discharging such a public cal ing as that assumed by a telegraph compan can impose upon its patrons only such regul tions as are *reasonable;* and for a regulation be reasonable in any sense, its observance mus in the nature of things, *tend to effect that which it is professedly aimed.* On this ve ground, the stipulation as to repetition has be sometimes upheld (although declared void many jurisdictions), as a reasonable regulati relieving the company from liability for *m takes in transmission,* and for *such delays delivery* as would have been prevented by t

repetition. The courts, however, have never permitted a telegraph company to shield itself, behind this stipulation, from liability for *delay* in delivering a telegram, except when repeating the message would have naturally tended to prevent the delay,—and then only when the company was *not* grossly or wilfully negligent.

The moment the company attempts to stretch such a stipulation limiting liability, to cover a case wherein compliance with its terms would have no imaginable tendency to prevent the default with respect to which exemption is sought, —that moment and to that extent the stipulation becomes an *unreasonable* regulation, and, notwithstanding its *literal* import, the law grants the injured party relief.

A case exactly in point, wherein the views here expressed are fully sustained, is that of *Box v. Postal Telegraph Cable Co.*, 165 Fed. 138. The court there says of the stipulation respecting the repetition of messages:

> "The rule is not intended to secure a timely effort to *send* the message, but to make more certain its *accurate transmission*. The company is under obligation to send the message with reasonable promptness for the regular rate when it receives such rate and accepts the message. * * * The message must, of course, be sent *before* it can be repeated; it must be sent and repeated before any comparison could be made. Although the regulation purports

to be made to guard against mistakes or delays, it should be construed to refer *to such mistakes and delays as could be corrected or avoided by repetition and comparison;* otherwise, a delay caused by the conduct of the company in negligently failing to send or to attempt to send the message would come within the rule. And it is held that it does not apply where 'no effort was made to put the message on its transit.' *Birney v. N. Y. & W. P. Tel. Co.,* 18 Md. 341, 81 Am. Dec. 607. It is difficult to believe that the stipulation was intended by the parties to be applicable to a case in which *the conduct of the company made it impossible for the message to be repeated.* We believe it would be wholly unjust and not within the intention of the contracting parties to permit this rule to exonerate the company from liability for a failure which, like the one here charged, would *not have been prevented* by repeating the message." [Citing numerous authorities.]

165 Fed. 141.

In *Purdom Naval Stores Co. v. Western Union Tel. Co.,* 153 Fed. 327, it was held that the stipulation for non-liability in the case of unrepeated messages was inapplicable where there was an utter failure to deliver the message at all.

In *Postal Tel. Cable Co. v. Nichols,* 159 Fed. 643, the Circuit Court of Appeals for the Ninth Circuit distinguished *Primrose v. Western Union Tel. Co.,* 154 U. S. 1, from the case in

hand (which was one of delay in transmission due to a connecting line's wires being down), on the grounds, 1st, that the company was advised of the importance of the message and of the time when it would have to be delivered, and then undertook to transmit and deliver the same after satisfying itself of its ability to do so; and, 2nd, that within ten or fifteen minutes after the filing of the message the company became aware of the interruption in its transmission.

A somewhat fuller exposition of the reasoning whereunder the courts have refused to accord to the stipulation of non-liability for unrepeated messages, the effect of relieving the company from the consequences of delays not occasioned by the failure to have the message repeated (and which, accordingly, repetition would not have tended to prevent), are found in the Nevada and Missouri cases hereinafter cited. In *Barnes v. Western Union Tel. Co.*, 24 Nev. 125, 50 Pac. 438, the action was for delay in delivery not due to any mistake in the name or address of the addressee. The court there said:

> "The evident and *only* objects in having telegraphic messages repeated are to enable the operators transmitting and receiving the same over the wires to readily *detect and correct any mistakes or errors* they might make in the message as received for

transmission and delivery, and thus enable the defendant to avoid such errors, and their legal consequences. A delay, or the non-delivery of a message, might be caused by mistake made by the operators in the name or the address of the person to whom the message is sent, which might be detected and corrected if the message was repeated, and thereby delay or the non-delivery of the message be avoided. * * * When the repetition of the message could *not* have had any *tendency to prevent the delay* in the case, and when the delay was *in no manner attributable to its not being repeated,* the stipulation cannot, in our opinion, be held, with any degree of reason, to have the effect of restricting the defendant's said liability. To consider that the minds of the parties met and agreed that the defendant's liability should be restricted for delay in delivering the message after it reached the Lovelock office, although it might be transmitted to and taken off there without any mistake occurring, it seems to us would be without reason, and would be ascribing to the parties an intent to relieve the defendant from the legitimate consequences of making default in the performance of a legal obligation, however great the damages might be to the plaintiff resulting therefrom, simply because he did not see fit to have the message repeated, and pay an additional sum therefor, although the doing of it might prove to be *utterly useless and nonsensical as a preventive* of such default. So long as the parties are to be regarded as legally competent to enter into contracts, we cannot impute to them any such intent. If the telegraph company had such intent in plac-

ing such stipulations on its blank forms, then, evidently, its object was to deceive its patrons, and entrap them into unconsciously relieving it from liability for non-performance of a plain legal and moral obligation. We are not willing to ascribe to it such intent or object. The repetition of the message would have had no legitimate effect to induce or to expedite the delivery in this case. 'It is clear that, if such a stipulation, assented to, is sustained as having the force of a contract or condition, the company is under no obligation to deliver any unrepeated message. For this reason such stipulations, exacted and assented to, are generally treated as unreasonable and void.' 3 Suth. Dam. § 958."

50 Pac. 437-440

In *Jacobs v. Western Union Tel. Co.*, 196 Mo. App. 300, 196 S. W. 31, the action was for failure to deliver the message until ten days after its transmission to the office of destination. After citing *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, as sustaining the stipulations on the message blank in limiting "liability for delays, misdelivery and incorrect transmission," the court says:

"But we think there is no ground in this case upon which to apply the limitation to the price of the message on account of it not having been repeated, for the reason that the mischief committed here was not in the transmission. It was correctly sent, and therefore to repeat it would not have had any tendency to lessen the 10 days'

delay in delivery. * * * There was nothing in the message that caused the delay, or that repeating of transmission would have cured. To repeat a message will correct any error in transmission, but how it could have any influence or application to failure to deliver to the sendee is difficult to understand. * * * That part of the company's limitation of liability for an undelivered, unrepeated message can only apply to something where repeating would reasonably tend to its benefit in the matter of delivery. Thus, if error was made in the name or address of the sendee, it would directly affect the delivery; but if the entire telegram is right in the first instance, this reason does not exist. * * * *Western Union Tel. Co. v. Henderson,* 89 Ala. 510, 520, 7 South. 419, 18 Am. St. Rep. 148; *Railway v. Wilson,* 69 Tex. 739, 7 S. W. 653; *Western Union Tel. Co. v. Graham,* 1 Colo. 230, 235, 9 Am. Rep. 136; *Thompson v. Telegraph Co.,* 107 N. C. 449, 457, 12 S. F. 427."

196 S. W. 33-34.

This court further suggests, without deciding the point, however, that a stipulation limiting the company's liability to the charge collected,

"is not, properly speaking, a contract at all * * * but a declaration that there is no liability; since the sum paid would be due the sender by reason of the unperformed service, without such stipulation. The so-called agreement is nothing more than a claim of one-sided right to wrongfully fail to perform the contract without being re-

> sponsible for any damage occasioned by the wrong. * * * to assert an unqualified release from all liability save to refund the charge collected for the unperformed service is, in effect, to claim non-liability for negligence."
>
> 196 S. W. 34.

In accord with the cases above quoted are the following:

- *Fleischner v. Pacific Postal Tel. Cable Co.*, 55 Fed. 738, (Cir. Ct. D. Ore.), affirmed in
- *Pacific Postal Tel. Cable Co. v. Fleischner*, 66 Fed. 899, (C. C. A., Ninth Circuit);
- *Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734;
- *Bryant v. American Tel. Co.*, 1 Daly 575 (N. Y.);
- *Birney v. New York, etc., Telegraph Co.*, 18 Md. 341, 359, 81 Am. Dec. 607;
- *Beatty Lumber Co. v. Western Union Tel. Co.*, 52 W. Va. 410, 44 S. E. 309;
- *Union Construction Co. v. Western Union Tel. Co.*, 163 Cal. 298;
- *Western Union Tel. Co. v. Graham*, 1 Colo. 239, 9 Am. Rep. 136.

The cases upon this subject are collected in a note in

10 Ann. Cas. 857-860.

An attempt is made on the part of defendant to distinguish, on their special facts, the cases cited in support of the proposition now under discussion; but a moment's consideration will suffice to demonstrate that the divergences between them and the case at bar do not bring into operation any different legal principle. The supposed grounds of distinction relied upon divide the cases into two classes, viz.:

(a) Cases in which *no attempt* was made at all *to transmit* the message; and

(b) Cases in which the delay occurred *after a prompt transmission* to the office of the company at the place of destination.

The ground upon which the courts have refused to apply the stipulation of non-liability for unrepeated messages to the former class is, as stated in the *Box case, supra,* that "it is difficult to believe that the stipulation was intended by the parties to be applicable to a case in which *the conduct of the company made it impossible for the message to be repeated.*" With respect to the latter class of cases, the *ratio decidendi,* as declared in the *Barnes case, supra,* is that "the repetition of the message would have had *no legitimate effect to induce or to expedite delivery.*"

Now, in the case at bar, we have such conduct on the part of defendant as "made it impossible for the message to be repeated." Even were

this not true, the other ground of decision would still be present. Repetition presupposes a single completed transmission, in due season, to the office of destination. If defendant had completed such a transmission of the message in question either to Wabuska or to Yerington on the night of April 29th or early in the morning of April 30th, no repetition back to Oakland from either of those points would have had any "legitimate effect to induce or to expedite delivery." A repetition from Wabuska would not have tended to make certain or prompt the performance by defendant of its obligation to deliver the message to the connecting telephone line, any more than a repetition from Yerington would have made certain or prompt its delivery to the bank.

Defendant neglected, for three days, to complete a single, through transmission of the message *even to its own terminus*, Wabuska. To apply the stipulation of non-liability for unrepeated messages to such a case would be to hold that defendant may or may not transmit such a message promptly or at all, according to its whim or its mood of indifference at the time, and that, in case it does not, it will be absolved of all liability except for the charge collected by it for the service it has failed to perform. And this would be true even where the default was deliberate and willful. There is, however, an

obligation imposed by law upon a telegraph company from which it cannot escape, no matter what may be the terms it seeks to impose upon the sender. It must exercise "great care and diligence in the transmission and delivery of messages," and where no unavoidable interruption of the working of its lines is shown, that comprehends a single, through transmission of the message with reasonable promptness after it is accepted for such transmission. There is, in the record, evidence to the effect that such a message as the one in question could be transmitted from Oakland to Yerington "within 20 or 30 minutes" [Tr. p. 153], and even defendant's witness, Quinn, testified that this could be accomplished within 30 minutes, although ordinarily "one hour at least is the time I would consider." [Tr. p. 143.] If defendant had made a single, through transmission of the message within even 10 or 11 hours, it would have sufficed; but when, at the end of some 72 hours, it finally transmitted the telegram to Wabuska and then to Yerington, it might just as well have never transmitted it at all, or never put it in course of transmission, for all the good it could accomplish for plaintiffs at that late date. Such a transmission was no transmission at all within the terms of defendant's undertaking.

There is an obvious fallacy in defendant's contention that cases in which the company does not put the message in course of transmission at all, are distinguishable from those wherein it is put in transit but is delayed at some intermediate point on the lines of the company. Until there is a thorough transmission of the message to the office of destination, there is no possibility of repeating it. The conduct of the company in any such case gives rise to this impossibility, and this is true no matter whether the failure to complete a single transmission is due to the message not having been put in transit or to that transit having been interrupted after it has commenced but before it has been accomplished. The doctrine of the *Box case, supra,* and others similar thereto is, therefore, strictly applicable to every instance in which the delay is not due to mistake but has occurred through failure to *complete* transmission *in due time* to the office of destination. What is said in the *Union Construction Company v. Western Union Tel. Co.,* 163 Cal. 298, to the effect that the stipulation of non-liability for unrepeated messages "should be interpreted to provide only for *delays* * * * occurring in the forwarding of a message from the company's desk where it is received from the sender to the company's office where it is written out and made ready for delivery to the addressee," was wholly un-

necessary to the decision there rendered and is mere *dictum*,—the point decided being that the stipulation was inapplicable to a delay in delivery, after a prompt and correct transmission to the office of destination. And the reasoning on which the court determined that single point is precisely in line with that whereby we have endeavored to sustain this portion of our argument herein.

Even if the *Union Construction Company case, supra*, were to be regarded as an authority for the proposition that the stipulation in question is applicable to delays at any point between the sending and receiving offices, it would still avail defendant nothing; for, counsel to the contrary notwithstanding, the trial court did not find that the delay herein occurred at any point *intermediate* with reference to Oakland and Wabuska. The sole finding in this regard is that defendant "wholly failed and neglected to transmit said message to said Wabuska until May 2d, 1907",—the third day after it was sent. [Finding XV, Tr. p. 58.] There is no finding ~~at all~~ as to when, if at all, it was put in transit. However, the evidence was that the message reached Reno, an intermediate relay point, about 40 minutes after it was accepted for transmission [Tr. p. 70], and that half an hour later [Tr. p. 119], it was transmitted by the Reno operator to an office that he *took to*

be Wabuska because it answered the Wabuska call [Tr. pp. 120, 124-125]; but the fact as found is that it did not reach the Wabuska office till the third day thereafter. [Tr. p. 58.] It was also in evidence that the same wire served Wabuska and numerous other points,—both those intermediate with respect to Reno and Wabuska and also those beyond Wabuska. [Tr. p. 122.] It is apparent, therefore, that the Wabuska call must have been answered by some other office, and it is in evidence that this was perfectly possible. [Tr. p. 124.] Now, as there was uncontradicted evidence that defendant's claims agent had admitted that the message was erroneously sent either to Goldfield or to Tonopah [Tr. pp. 96, 107-108], and as neither of those points was on the Wabuska wire [Tr. p. 123], the only possible finding upon the subject would have been that the delay occurred,—not at an intermediate point,—but at some point wholly off the only line over which it was possible to transmit messages to Wabuska or to Yerington. That this delay was wholly on defendant's lines and not upon those of the connecting telephone company, is expressly found. [Finding XV, Tr. pp. 58-59.] Despite a strenuous effort on defendant's part to prove the receipt of the message at Wabuska on the night it was sent, Mr. Harrington, its claims agent, testified that, except for Reno, he did not

find, in his investigations, any point to which the message was transmitted on that evening or at any time prior to May 2nd. [Tr. p. 131.] It is significant, however, that he never took the trouble to make any investigation of defendant's records either at Goldfield or at Tonopah. [Tr. p. 131.]

Counsel contend, on the erroneous assumption that the delay occurred at an intermediate point, that the repetition of the message would have been effective to obviate delay. As has been seen, the courts that have had occasion to consider this precise point, have been unanimous in holding that such is not the fact; and having regard to the nature of the act of repetition, it is impossible to understand in what way it could have lent itself to expedition. We find defendant's own witness, Quinn, in accord with us on this point. In attempting to account for his failure to advise plaintiffs to have their message repeated, he testified that he did *not* think "repetition of the message from Wabuska back to Oakland would have had *any tendency to assure delivery*," and that defendant does *not* notify the senders of *repeated* messages "*if no repetition comes back,*" but only of *non-delivery* "upon receiving a notice to that effect." [Tr. pp. 148-149.]

If the operator who impersonated defendant's Wabuska agent, had repeated the message, no-

body but himself would have been any the wiser and the same delay would have occurred. The whole trouble with repetition, in a case such as the present, is that it is valueless as a safeguard except for the detection and correction of errors in a message that has once been transmitted *to the office of destination.* It presupposes that the company's operators will at least complete the initial transmission to the office named in the address. The repetition provided for is not merely a telegraphing back from *each successive relay point* to the office from which the message was *immediately* received. It is a repetition from the point of *destination* back to the *originating office.* In some form, the message must have been sent through to the correct destination before there is anything upon which the stipulation as to repeating can operate.

To order a message repeated does not tend to render more certain the performance of this initial duty resting upon the company. True, such an order is some notice of the *importance* of the message; but it is more especially a notice that the *correctness* thereof is the matter particularly to be safeguarded, than that special speed is sought, since the repetition is declared by the message blank to be "for *comparison.*" Moreover, how could such notice come to the attention of the operator at the point of destination unless the company discharged its primary

duty of once transmitting the message through to that point? As for notice in the case at bar, the findings set fort' at length the insistence of plaintiffs upon the necessity for immediate transmission and delivery, upon the amount of the loss that they would suffer in event of delay, and upon the assumption by defendant of full responsibility for delays. [Finding VIII, Tr. pp. 49-51.] If the message had been ordered "repeated" a dozen times over, defendant could not have been half so effectually advised of the imperative call for promptness and of the risk it would assume in undertaking to effect a delivery that would answer plaintiffs' necessities.

Of course, as defendant points out, it is not repetition merely that the stipulation requires or contemplates. The more important thing is the *extra charge* thereby imposed upon the sender if he desires to avail himself of the option to send the message at the risk of the company, instead of at his own. There is, however, scant comfort for the defendant in this circumstance; for plaintiffs exercised that option by sending their message at defendant's risk and paid therefor the extra toll demanded by it for the assumption of liability as an insurer against delays.

Defendant's argument in support of the proposition that repetition would have prevented delay, proceeds as though the stipulation were

so framed as to require the originating office (in nautical phrase) "to stand by" pending the repetition, and, failing its prompt receipt, to make further efforts to supply the failure to transmit, that counsel assume would be thereby demonstrated. But the terms of the stipulation preclude any such idea. The message is to be telegraphed back,—not to advise the originating office that it has been transmitted to the designated destination,—but "for *comparison*" of the verbiage that is repeated with that of the original draft. Apparently, the originating office of defendant goes about its ordinary affairs and completely dismisses from mind, after putting it in transit, even a repeated message, except to receive the repetition (if, ultimately, it be made), and to compare it with the original. (See, in this connection, the testimony of Mr. Quinn, last above referred to.) There is no hint in the record that, at intervals or at all, defendant sends out "tracers" or makes additional efforts to secure a through transmission, in the event that a message *ordered* repeated is not *in fact* repeated. On the contrary, after plaintiffs had been allowed to wait some fourteen hours without any effort being made by defendant even to learn the fate of the message, they called at the Oakland office only to be advised that "the message had gone out on time, but had not been repeated," and that defendant

would use the extra money they had paid for the insurance of promptness to send out a "tracer." [Tr. p. 106.] So that not only did defendant *know* that the message was one calling for repetition and that it had *not* been repeated, but it took the position that it was *under no obligation* to make any effort to speed up even a repeated message or, except at plaintiffs' expense, to learn its fate. This conduct on defendant's part constitutes a practical construction by it of the stipulation as to repetition conforming precisely to plaintiffs' contention that that stipulation was not designed to accomplish anything but the detection and correction of errors in transmission.

(1) Cases on the Repeated Message Clause Cited by Defendant.

Counsel place their chief reliance upon *Primrose v. Western Union Tel. Co.,* 154 U. S. 1, claiming that the decision of the Circuit Court of Appeals herein is in conflict with the doctrine of that case. Nothing could be farther from the fact. That case establishes the validity of the stipulation of non-liability for unrepeated messages for the purpose of exonerating the telegraph company from responsibility for *mistakes* in transmission,—not for *delays* therein or in delivery. The ground upon which this court so decided is indicated in that pas-

sage of the opinion declaring that the stipulation gives the sender of a telegram "the *option* to send it in such manner as to hold the company responsible, or to send it for a *less* price *at his own risk.*" [154 U. S. 16.] Now, even if it were assumed that the physical act of repetition would have a tendency to obviate delays not attributable to error in the name or address of the addressee,—which, of course, we deny,—nevertheless the quotation just made from the opinion in the *Primrose case, supra,* effectually disposes of any adverse bearing it might otherwise be supposed to have upon the decision of the Circuit Court of Appeals in the case at bar. Here plaintiffs availed themselves of their option by sending their message at a rate *in excess* of the ordinary tolls in order to hold defendant responsible for delays, and *expressly rejected the alternative* accorded them "to send it for a *less* price *at their own risk.*" When plaintiffs contracted and paid for defendant's responsibility for delays, they did all that was required of them even under this doctrine of the *Primrose case;* and it is not too much to say that this court there recognizes the soundness of the distinction upon which we insist.

The opinion in that case speaks, without discriminating between them, of delays, as well as mistakes, in transmission and delivery; and

this is as might be expected, for the stipulation in question itself deals indiscriminately with both. Whenever delay is mentioned, it is as an incident to the discussion of the subject of mistakes in transmission and merely because the two matters are dealt with conjunctively in the stipulation.

All of the cases cited by defendant are distinguishable upon the same ground. In none of them was there a *special contract* of any kind, whether for the repetition of the message or for the insurance of its immediate transmission or delivery. In none of them was any charge paid in addition to the ordinary tolls. In none of them was there any attempt by the sender of the message to procure a different type of service, or a different measure of responsibility, than such as is regularly given by the company for its ordinary charge and on its ordinary terms. In none of them was there any special mode of sending the message suggested by the company or adopted by the sender, —the message being simply offered for transmission written upon one of the company's blanks containing the usual stipulations. In the few instances in which the sender's ignorance of the terms of these stipulations was relied on, there was no element of fraud or deceit on the part of the company in supplying a writing at variance with the contract orally

negotiated. Hence, even those few of defendant's cases in which the gist of the action was *delay*, do not, by reason of the distinguishing features just adverted to, constitute adjudications adverse to plaintiffs, or at all in point herein. The great majority of them, however, arose out of *mistakes* in transmission other than in the address of the message, and, for that additional reason, have no bearing upon the present inquiry.

It may be helpful to indicate very briefly the precise point decided in each of the cases relied upon by defendant. This may be done in most instances, by a mere statement of the particular default complained of in each case, thus:

Primrose v. Western Union Tel. Co., 154 U. S. 1,—*error* in the transmission of the body—as distinguished from the address,—of a cipher message.

Camp v. Western Union Tel. Co., 1 Metc. (Ky.) 164, 71 Am. Dec. 461,—*error* in the transmission of the body of the message.

Western Union Tel. Co. v. Carew, 15 Mich. 525,—*error* in the transmission of the body of the message.

Western Union Tel. Co. v. Coggin, 68 Fed. 137,—*non-delivery* of the message. The court

there placed its decision on the ground that it did not appear the message would have been understood by the addressee, nor that he would have complied with the request it was designed to convey, nor that the telegraph company had been advised what the message was about or respecting the amount of damage, if any, that would result from error in transmission,—matters that did not appear from the face of the message. The holding was that, under such circumstances, the company could not be regarded as having assumed any responsibility for defaults as to the consequences of which it was in the dark.

Cultra v. Western Union Tel. Co., 44 I. C. C. 679,—the sole contention was "that rates, and rules of this kind affecting rates [referring to the repeated message clause] that limit the liability of a telegraph company *for errors in transmission* are unreasonable."

Union Construction Co. v. Western Union Tel. Co., 163 Cal. 298,—*delay in delivery* of the message after it had been duly transmitted. All that the court says respecting the force of the repeated message clause to relieve the company from liability for delays prior to the receipt of the message at the office of destination, is mere *dictum*. The case is an authority supporting plaintiffs' contention.

Ellis v. American Tel. Co., 95 Mass. 226,—*error* in the transmission of the body of the message. This case merely holds that in event of such a default, the repeated message clause is effective "if made known to those with whom they [telegraph companies] deal, and directly or by implication assented to by them [the senders]."

Grinnell v. Western Union Tel. Co., 113 Mass. 299,—*error* in transmission consisting of the omission of a material word in the body of the message. While it is true that an offer was made at the trial to prove that a repetition would not have supplied the omission,—which offer was rejected,—the court, in sustaining such rejection, said: "The report does not show how such evidence could possibly have proved that fact." Of course, although repetition may fail, in a particular instance, to detect and correct an error, nevertheless it is always a safeguard tending to accomplish that end, and the company is entitled to extra payment for the additional service involved in adopting this safeguard if it is to be held liable for defaults that might thereby have been prevented. This, however, is a very different thing from saying that the sender of a message must order it repeated and pay therefor when the default complained of is a delay not occasioned by any

error in transmission and when, therefore, repetition would *necessarily* have been an idle act having no tendency whatever to prevent that default.

Clement v. Western Union Tel. Co., 137 Mass. 463,—*delay in delivery* of the message after it had been duly transmitted to its destination. The doctrine of this case is, of course, repudiated in the numerous cases hereinbefore cited, involving similar states of fact,—notably in *Union Construction Co. v. Western Union Tel. Co., supra*, relied upon by defendant.

Pearsall v. Western Union Tel. Co., 124 N. Y. 269, 26 N. E. 534,—*error* in the transmission of the *name of the addressee* consisting of the omission to transmit the words "and Company" in the name "T. W. Pearsall and Company," whereby the message was not opened by the corporation but was allowed to await the return of the individual who was absent at the time. The telegraph company was held responsible; so that, as far as it goes, the case is adverse to defendant herein. The point of the decision, however, is that as the message had been written on a blank sheet of paper, the sender could not be held bound by the usual stipulations of the company with which he was familiar.

Kiley v. Western Union Tel. Co., 109 N. Y. 231, 16 N. E. 75,—*non-delivery* of the message through *failure to transmit.* The doctrine of this case is, of course, necessarily repudiated in a number of the cases relied upon by plaintiffs and heretofore cited, notably in *Box v. Postal Tel. Cable Co., supra,* and *Pacific Postal Tel. Cable Co. v. Fleischner, supra.*

Riley v. Western Union Tel. Co., 28 N. Y. Supp. 581,—*delay* in the transmission of the message not due to error therein. The doctrine of this case is opposed to the later cases upon this question and hereinbefore cited.

Birkett v. Western Union Tel. Co., 103 Mich. 361, 33 L. R. A. 404,—*delay* in the transmission of the message. The case was decided on the authority of *Clement v. Western Union Tel. Co., supra,* the doctrine of which has been repudiated, as we have seen. The precise ground of decision was that "the demand for its repetition is a notice of its importance, and of the necessity for promptness, additional to the language of the message itself." In the case at bar, what more in the way of notice could have been accomplished by "ordering the message repeated" (*in haec verba*) we are unable to conceive. The *Birkett case, supra,* is further distinguishable upon its facts. The court there said:

> "If the order to repeat had been contained in the message we cannot say that the operator at Detroit [an intermediate point], upon finding that he could not get the office at Dearborn [the destination], would not have at once telegraphed to the plaintiff [the sender] that fact."
>
> 33 L. R. A. 408.

In the case at bar, there was an affirmative showing by defendant's own witness, Quinn, to the effect that, even though the message *had* been ordered repeated, defendant would *not* have notified plaintiffs in the event that no repetition thereof had been received at the originating office.

Stone v. Postal Tel. Co., 31 R. I. 174, 76 Atl. 762,—*delay* in the delivery of the message. The case was decided upon the grounds (a) that the claim of loss was barred because it had not been filed within the time stipulated on the message blank, and (b) that "if the sender desires to have special care expended upon it, it is not unreasonable to ask him to *pay for such particular attention,*" and that if the company "may be held liable for large damages, it must, for its own protection, *charge more for the service.*" In the case at bar, plaintiffs were asked to pay and did pay an additional charge for the "particular attention" they demanded for their message and for defendant's extraordinary responsibility.

In most of defendant's cases, the senders of the messages were familiar with the terms of the message blanks, and even when not so familiar, their actions in offering the messages for transmission constituted assent to those terms. In addition, the great majority of those cases involved mistakes in transmission,—not delays therein or in delivery. But apart from these grounds of distinction, the case at bar is differentiated from all others that have come to our notice by the presence of the following elements, to-wit:

1. Explicit *notice* to defendant, (a) of the *importance* of the message and of the need of *great expedition;* (b) of the *time* within which delivery would have to be made in order to avail anything; and (c) of the *amount* and the particulars of the loss that would be entailed in the event of delay beyond that time.

2. Demand by plaintiffs that defendant assume the liability of an *insurer* against delays and their request for guidance as to how this might be contracted for in conformity to defendant's regulations. This, of course, involved rejection by plaintiffs of any idea of giving assent to any terms except such as corresponded with the directions that defendant undertook to give them.

3. The giving by defendant of the directions asked by plaintiffs, after it had satisfied itself

that the lines were in working order, and *plaintiffs' conformance to those directions* in all particulars, including the payment of an *extra toll* for the special attention and responsibility demanded.

4. Defendant's failure to repeat the message, or to make any special effort to expedite its prompt transmission and delivery.

5. The extraordinary and inexcusable character of the delay.

(c) THE STIPULATION OF NON-LIABILITY FOR MESSAGES FORWARDED OVER CONNECTING LINES IS NOT IN CONFLICT WITH THE SPECIAL CONTRACT OF INSURANCE AND HAS NO APPLICATION TO THE CASE AT BAR.

The stipulations on the message blank are to be construed strictly as against the company. Looking at the stipulation respecting connecting lines, we find that the company "is hereby made the *agent* of the sender, *without liability,* to *forward* the message over the lines of any other company when necessary to reach its destination." [Tr. p. 54.] That these terms cannot relieve defendant from liability in the present case is apparent from the following considerations:

(1) The stipulation contemplates non-liability only for those defaults *occurring on the connecting line,*—that is, during such portion of

the transmission as is *beyond* the originating company's immediate control. In the case at bar, the delay occurred *wholly upon defendant's lines,*—no delivery of the message to the connecting telephone line having been made or attempted for three days. [Findings XIII, XV; Tr. pp. 56-57, 58-59.] Of course, defendant is not acting as an agent to *forward* the message over a connecting line until it has completed the transmission thereof to its own terminus and at least delivered a copy to the connecting company.

(2) The stipulation has reference only to *telegraph*—not to *telephone*—lines. To send a message by telegraph requires special skill and training. This is not so with respect to the telephoning of a message, and therefore there is no reason for granting an exemption from liability with respect to forwarding messages by telephone.

(3) The stipulation applies only to those *casual instances* in which the company finds it necessary to forward a given message over other lines, and not to the case of a *standing agreement* or established practice whereunder the company forwards *all* messages for a given destination over another line selected in advance by it as the *permanent* instrumentality for that purpose. It would be strange, indeed, to have the sender of a message appoint the company

his agent to forward it over a connecting line when, at a previous time, the company had already arranged with that line to transmit all messages offered for transmission to destinations on the connecting line. To *ratify* a *prior* general arrangement and to relieve the company from liability for what may occur thereunder, is *one* thing; but to *appoint an agent* to forward over a connecting line is a wholly different matter, and contemplates that, *subsequent* to the appointment, the agent will negotiate with the connecting line for the forwarding.

(4) The stipulation does not inhibit the making of a *special agreement* to deliver beyond the terminus of defendant's lines; and such a special agreement was made in the case at bar.

On the facts found, it is apparent that the stipulation in question can have no application. Defendant *never exercised its agency* to forward the message in question until May 2nd, and no delay occurred on the connecting telephone line. Plainly the stipulation in question is intended to relieve defendant from responsibility for the negligence of the connecting line, over which it can have no control. Any other interpretation would render the stipulation itself void as unreasonable. To be in a position to invoke it, defendant *must have forwarded* plaintiffs' message *promptly* and correctly; and to do this it must have transmitted the message

immediately to Wabuska and delivered it to Yerington Electric Company. The findings negativing this situation render the stipulation respecting connecting lines wholly inapplicable.

It has been held that where a contract for the interchange of business and the division of tolls thereon, is entered into between two telegraph companies, the stipulation on the telegraph blank with respect to non-liability for delays occurring on connecting lines, does not relieve one company from liability for the negligence of the other.

> *Postal Tel., etc., Co. v. Harriss,* 122 S. W. 891 (Tex.).

In *Southwestern Tel., etc., Co. v. Taylor,* 26 Tex. Civ. App. 79, it is held that where there are connecting telephone lines with a common agent at the connecting point, the first line is liable for the negligence of that agent in failing to make the connection between the two lines.

Here, if ever, we have a case wherein is found ample justification for the bitterness of the attack made by the text-writers upon these telegraph stipulations. Plainly, as Thompson, Gray, Jones, and perhaps others point out, the stipulations as to repeating, insuring, *etc.,* were never *really* intended (despite the factitious appearance given them) to afford the public an

opportunity of securing, by payment of a reasonable consideration therefor, special speed or care in their telegraphic communications, or adequate indemnity for defaults when that special speed or care has been contracted for; but were adopted solely with a view to providing a loop-hope through which, under the guise of *limiting* liability, the company might *escape all liability* for the consequences of *every* instance of negligent, reckless, or even wilful misconduct.

III.

The Finding That the Delay Complained of Was the Result of Defendant's Gross Negligence Is Conclusive, and No Stipulation Can Exempt It From Liability for the Consequences Thereof.

As has already been pointed out, under the heading, "The Scope of the Inquiry Herein," defendant cannot now question the sufficiency of the evidence to support the special finding that the delay complained of was due to its gross negligence.

However, under the present head of plaintiffs' argument, we refer incidentally to some of the evidence whereon the court based its finding of gross negligence.

The authorities are unanimous in denying to the stipulations on the message blank—no mat-

ter what their terms—the force of relieving the company from liability for the consequences of its own gross or wilful negligence or bad faith. To the general proposition it is almost unnecessary to cite cases, but reference may be had to a few of those relied upon herein by defendant.

For example, see

Ellis v. American Tel. Co., 95 Mass. 226;

Grinnell v. Western Union Tel. Co., 113 Mass. 299;

Riley v. Western Union Tel. Co., 28 N. Y. Supp. 581.

The case of *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, upon which defendant principally relies, itself contains a plain intimation that, where a finding of *gross* negligence is justified, no stipulation or other regulation can relieve the company from liability therefor. This court, in commenting upon the trivial character of the errors in transmission there complained of, declared that "a jury would not have been warranted in finding that it was *more than ordinary negligence.*" [154 U. S. 27.]

In the case at bar, however, we have a flagrant instance of gross negligence. *Three days' delay* in the transmission and delivery of any telegram—particularly when its importance was

apparent on its face and was *fully explained to the company*—is negligence of so gross and inexcusable a kind as to remove the case from the sphere within which such stipulations are accorded any force of exemption. The ordinary prudent and reasonable man—whose supposititious conduct, under circumstances such as those presented in the case under consideration, is always the criterion of the degree of care or negligence displayed—would infallibly have exercised far greater diligence in a matter of such importance. A delay of three days, when the company was *fully advised* of the circumstances that made delivery within ten or eleven hours *absolutely indispensable*, and when it thereupon undertook, for an *additional* compensation, to effect an *immediate* delivery and evidenced its undertaking in that regard by writing the words, "deliver immediately," on the face of the message—is either *gross* or *wilful* negligence—that is, it amounts to a *wanton disregard* of the rights of plaintiffs.

The Civil Code of California, sec. 2162, requires of a telegraph company *"great care and diligence* in the transmission and delivery of messages." In *Western Union Tel. Co. v. Cook*, 61 Fed. 624, 629, (C. C. A., Ninth Circuit), it is held that no stipulation can have the effect of relieving it of its obligation to exercise that degree of care and diligence required of it by

this statute. (See, also, *Union Construction Co. v. Western Union Tel. Co.*, 163 Cal. 298.) Surely three days' delay is not the exercise of that "*great* diligence" required by the law's express provision. Only a *slight* degree of negligence—if one may differentiate between degrees of negligence—would be an absence of such "*great* care and diligence"; or, to put it in another way, any slight or ordinary lack of care when great care is exacted by express legislative enactment, is *gross* negligence. And as already seen, there can be no exemption from liability for gross or wilful negligence, or for bad faith. See most of the cases herein cited, and also

> *White v. Western Union Tel. Co.*, 14 Fed. 710;
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> *Hart v. Western Union Tel. Co.*, 66 Cal. 579;
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> *Redington v. Pacific Postal Tel. Cable Co.*, 107 Cal. 317;
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> *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519;
>
> *Western Union Tel. Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339;
>
> 3 *Sutherland on Damages*, Sec. 296.

In *Hendershot v. Western Union Tel. Co.*, 106 Ia. 529, 68 Am. St. Rep. 313, it was held that five hours' delay was negligence entitling plaintiff to recover. A delay of ten or twelve

hours in transmission, if unexplained, has been held to create the presumption of negligence. See, ~~also,~~

Kendall v. Western Union Tel. Co., 56 Mo. App. 192;

Western Union Tel. Co. v. Clark, 25 S. W. 990 (Tex. Civ. App.).

When there are special circumstances, very much less delay will raise the presumption of negligence. In *Western Union Tel. Co. v. Boots*, 10 Tex. Civ. App. 540, 31 S. W. 825, a telegram was sent at midnight and was delivered at 9:30 a. m. It should have been delivered at 8:30 a. m., and this unnecessary delay of one hour was held to be negligence.

In the case of *Pierson v. Western Union Tel. Co.*, 150 N. C. 559, 64 S. E. 577, a night message was filed at 8 p. m. and was delivered between 9 and 10 a. m. the next day. It could have been delivered about 8 a. m. The addressee resided about 200 yards from the telegraph office. The court said: "That this is *gross* negligence is not open to discussion."

So, "a special undertaking to deliver without regard to office hours, in consideration of extra

payment, renders the company liable for failure to perform."

> *Western Union Tel. Co. v. Perry,* 30 Tex. Civ. App. 243, 70 S. W. 439;
> *Western Union Tel. Co. v. Cavin,* 30 Tex. Civ. App. 152, 70 S. W. 229;
> *Western Union Tel. Co. v. Hill,* 26 S. W. 252 (Tex. Civ. App.).

In view of the special circumstances that were fully disclosed to the company in the case at bar, and of the special undertaking on its part, in consideration of *extra* payment, to transmit and deliver immediately, there can be no doubt but that it was *grossly* negligent in not delivering the message, at the latest, very early on the morning of April 30th, 1907. The fact is that the telegram could readily have been delivered that morning—the day *after* it was sent—about *two hours before the bank received the draft.* In this connection will be recalled the testimony of defendant's agent who accepted the message for transmission. It was to the effect, as stated in the quotation above made from the opinion of the trial court herein, "that what was said to him about the importance of the message 'went in one ear and out the other; he did not pay any attention to it'." [Tr. pp. 163-164.] Comment would be superfluous, not only on this circumstance, but on the indifference displayed by defendant when inquiry was made at its Oakland

office respecting the fate of the message; its unwillingness to send out "tracers" except at plaintiffs' expense [Tr. p. 106]; its failure to make a prompt investigation of plaintiffs' claim herein—counsel's own statement at the trial being that "it had been allowed to lie dormant" for a year or two [Tr. p. 130]; its failure to send to Tonopah and Goldfield when advised that Quinn had said that the message had been erroneously sent to one or the other of those places [Tr. pp. 130-131]; and finally, its failure to produce the Wabuska operator or his deposition at the trial [Tr. pp. 129-130].

But counsel argue that, as "a very brief delay would have rendered the message useless," a delay for a greater period is not entitled to any evidentiary force on the question whether the negligence displayed is to be characterized as gross. (Petitioner's brief, p. 57.) We commend to the notice of the court counsel's notion of what constitutes "a very brief delay"! A delivery within eleven hours would certainly have sufficed for the message to accomplish its purpose. The message was accepted for transmission at 8:50 p. m. [Tr. p. 139.] By 9:30 p. m., it had arrived at Reno after traversing two relays and by far the greater part of the distance. [Tr. p. 70.] At 9:56 p. m., it was sent from Reno on the last relay on defendant's own lines and at the same moment it should

have been received at Wabuska, the terminus of defendant's line. [Tr. p. 120.] Even if the Yerington office was not open that night, nevertheless, it opened at 7 o'clock the following morning. The draft was not received by the bank until between 8:30 and 9 a. m. [Tr. p. 59], and the gold coin was not advanced thereon until later — some time "between the hours of opening and closing the bank's business on that day." [Tr. pp. 113, 59.] So that, if defendant had transmitted the message to Wabuska at 9:56 p. m. or at any time within ten hours thereafter, the loss would have been prevented. It is even probable that a delivery very much later in the day would have been in time to stop any advances by the bank on the faith of the draft. The bank did not open for business until 9:30 a. m. on April 30th. [Tr. p. 112.] While, as counsel state, the cashier of the bank testified on direct examination that the amount of the draft was credited immediately to Pitt and Campbell [Tr. p. 111], nevertheless on cross-examination he said that the bank did not credit Pitt and Campbell at all, but issued certificates of deposit to them "between the hours of opening and closing the bank's business on that day." [Tr. p. 113.] Hence, defendant had not less than two and one-half hours and possibly seven or eight hours after the Yerington telephone office opened,

within which to deliver a message over a telephone line eleven miles in length—this, of course, on the supposition that the message had been duly transmitted to Wabuska. Under the special circumstances of the case, any delay sufficient to render the message ineffectual to stop payment, if unexplained—and there was no explanation vouchsafed by defendant,—necessarily constituted negligence so culpable as to constitute reckless indifference equivalent to wilfulness.

But however such a delay as would have been *barely sufficient* to produce the injury, is properly to be characterized, certain it is that the fact of the occurrence of additional delay has the highest probative value on the attitude displayed by defendant in this whole transaction. Not that the added delay produces the injury, but that it throws light upon the state of mind that *was* productive of that injury.

IV.

The Pitt and Campbell Contract Left It to Plaintiff's Option to Withhold the May 1st Installment and Thereby Forfeit the Previous Payment and Terminate "All Rights of Each of the Parties Thereunder."

Obviously, if plaintiffs had the right, under their contract with Pitt and Campbell, to withdraw from the transaction and terminate their

liability by defaulting in the payment of any installment therein mentioned, defendant's delay in transmitting and delivering the message whereby they sought to exercise this right and prevent the payment of their draft, caused them to suffer a detriment that they would otherwise have escaped.

Plaintiffs' right of withdrawal depends upon the construction of the Pitt and Campbell contract. The construction of any contract is a matter of determining the intention of the parties thereto; and if, in a contract such as that here presented, the intent is displayed to leave further performance by plaintiffs to their option, there is no rule of law prohibiting the giving effect thereto.

By the contract in question Pitt and Campbell agreed "to sell and deliver," and plaintiffs agreed to "buy, take and receive," the mining stock—not absolutely,—but *"upon the following terms* AND CONDITIONS, to-wit:

"First: The total price or sum to be paid for the said shares of stock is $75,000.00 *in gold coin* * * * payable in the following manner [here are specified the installments with their respective dates of payment];

"Second: It is hereby agreed by [Pitt and Campbell] that immediately upon the payment of [the initial installment], they will deposit in escrow in and with the Lyon County Bank, * * * certificates of stock * * * endorsed *in blank* * * * and representing in the aggregate [the number of shares constituting the subject-

matter of the contract], and will thereupon enter into an escrow agreement with [plaintiffs] and said * * * bank, under which said * * * bank shall hold said shares * * *, to be delivered to [plaintiffs] immediately upon the payment by [plaintiffs] of the final payment * * *.

"Third: And it is further agreed that in the event of default by [plaintiffs] in making any of the payments herein provided for, said Lyon County Bank *shall be authorized under the terms of such deposit in escrow,* AND IT IS HEREBY AUTHORIZED, *to deliver all of the shares of stock* so deposited with it pursuant hereto to [Pitt and Campbell], and that all payments theretofore made by [plaintiffs] shall be forfeited to [Pitt and Campbell], *and that thereupon all rights of* EACH *of the said parties hereunder shall* FOREVER CEASE AND DETERMINE."

[Tr. pp. 45-46.]

Considering the terms of this contract as a whole, it is plain that there was no *absolute* sale of the stock, nor any *absolute* obligation on the part of plaintiffs. The certificates were delivered only *in escrow* and were endorsed only *in blank.* By its express terms, on a default in payment there was *automatically* effected *a return of the stock* to Pitt and Campbell. Having preliminarily *elected* (so to speak) to take back their stock on a default by plaintiffs in making payment, Pitt and Campbell were surely never in a position, by making a *different* election, to substitute another contract for the one entered into by plaintiffs. To keep the contract alive and in force so that the rights then exist-

ing under it should ripen into an actual sale and transfer of title, plaintiffs were, from time to time, to pay certain installments of the total price named. The results flowing from a default in this regard are *expressly* defined by the contract, and one of those results is stated to be that "ALL *rights of* EACH *of the parties hereunder shall forever cease and determine.*" That being so, there is no room for construing the provision respecting default as one to be taken advantage of *only by the vendors, at their option;* for the terms employed are contradictory of any such interpretation.

If, in case of default, the vendors had the right to enforce payment of further installments, such right existed only by reason of the contract, *i. e.*, it was *one* of the rights of Pitt and Campbell thereunder. But a default in payment is expressly given the force of causing "*all* of the rights of EACH of the parties," *i. e.*, the rights of Pitt and Campbell as well as those of plaintiffs, to "*forever cease and determine.*" The court cannot construe *any* right as subsisting in either party after a default in payment, without substituting another contract for the one in question. The effect of a default having been expressed in terms *excluding* any idea that the same would follow *only at the option* of Pitt and Campbell, no terms giving a different effect to such default can be imported or con-

strued into the contract. *Expressum facit cessare tacitum.* To hold otherwise would be to say that though the contract expressly provided for the termination of *all* rights of Pitt and Campbell, yet the only right they could *possibly* have thereafter was none the less still in existence. They had no choice, under their contract with plaintiffs, and under the deposit in escrow, but to take back their stock on any default—having in such event *"authorized"* its return by the bank to themselves at the very incipiency of the transaction. Surely the law does not countenance a construction so opposed to good sense as to require, in effect, the striking out from the contract of the provision that, upon default in payment, "*all* rights of *each* of the parties hereunder shall forever cease and determine."

A case precisely in point is that of *Ramsey v. West*, 31 Mo. App. 676. The court there had under consideration the effect of a forfeiture clause in an agreement whereby it was recited that "in consideration of the sum of $20,000, *to be paid* as hereinafter specified, the receipt of $5 of which is hereby acknowledged, the said John S. West *has this day sold* in fee simple to S. C. Schaeffer" certain described lands. "And the said S. C. Schaeffer, for himself and assigns, *agrees*, subject to the *condition* hereinafter named, *to pay* the said sum" in install-

ments therein stipulated. The contract further provided that, on receipt of the first installment, West would deliver to Schaeffer a deed for the premises, and that at the same time Schaeffer would deliver to West notes for the deferred payments, secured by a mortgage. The contract contained the following forfeiture clause:

> "It is understood that if the said Schaeffer * * * shall neglect or fail to pay * * * the first payment of $5000.00 on or before the time stipulated, then this agreement to be wholly void and shall *cease to be binding on* EITHER *of the parties hereto.*"

Schaeffer, having failed to make the first payment, afterwards refused to carry out the contract and complete the purchase. The lower court held that he was obligated to purchase the land and that the forfeiture clause was one that could be invoked or not solely at the election of West. In reversing this judgment, the appellate court said:

> "The condition of the contract with which it concludes *in express words is made for the benefit of both the parties thereto.* While the principle invoked by the plaintiff's counsel, 'it is a far-reaching principle of common law that a party shall not be allowed to take advantage of his own wrong, and courts will not so construe the contract as to enable the party committing the wrong to take advantage of it,' is a sound principle and firmly established, it has no application to a contract *whose language gives no reason for construction, and*

is susceptible of only one meaning, and that meaning is that the party failing to comply with one of the terms of the contract may, as well as the other party, on the happening of the failure, elect to put an end to the contract. Because, although the principle of construction should be given full force, *it cannot authorize the court to make a new and distinct and different contract for the parties.* The contract in this case clearly provides that Schaeffer, upon failing to pay or tender the first payment provided for thereby, might elect to treat the contract as at an end, for the words are, 'then this agreement to be wholly void, *and shall cease to be binding on either of the parties hereto.*' On no ground can we refuse to give the force, effect, and meaning to these words which they plainly intend."

31 Mo. App. 684.

On rehearing the court cites the case of *Bradford v. Limpus,* 10 Ia. 35, in support of its conclusion that the contract was an optional one, and says of the same line of authorities cited by counsel for defendant herein (including *Wilcoxson v. Stitt,* 65 Cal. 596, and *Mason v. Caldwell,* 5 Gilm. 196) that "they do not apply to this contract. * * * If the words used in the contract do not convey the meaning given them by us, *it would be difficult to conceive words that would do so.*"

It will be noted that in this case the contract recited that the vendor *"has* this day *sold"* for a purchase price *"to be paid,"* and that the vendee

"*agrees to pay,*" and to execute and deliver notes for the deferred installments at the time of the first payment. In the case at bar, we have an agreement by Pitt and Campbell to "sell and deliver," and an agreement by plaintiff "to buy, take and receive"—but these agreements are both explicitly declared to be "upon CONDITIONS." Hence the idea of an *absolute* obligation on the part of plaintiffs to purchase is expressly negatived—and particularly so when we consider the peculiar terms authorizing the depositary in escrow to return the stock and the unambiguous wording of the forfeiture clause.

A circumstance lending weight to this view is that at no point in the contract do plaintiffs *explicitly agree to pay* anything. The price "to be paid" is recited, but the only further recital is that it "shall be payable" in installments. While the absence of an express promise to pay might not relieve the vendee of his obligation to purchase if there were no forfeiture clause such as is here under consideration, nevertheless that absence is cumulative evidence of an intent to make the forfeiture clause available to both of the parties to the contract.

See, also, *Beckwith-Anderson Land Co. v. Allison,* 26 Cal. App. 473, where a contract for the sale of land provided that the vendee should make payment of a cash installment when the

agreement was executed, of a further sum on the delivery of the deed, and of the balance in three annual installments. The contract further provided that upon the failure of the vendee to pay the first installment, the vendor should be released from all obligations to convey, and *all rights of the vendee should cease*, and the cash payment should be "forfeited as damages for the non-fulfillment of the conditions hereof" by the vendee. The court, after observing that "it was * * * *unconditionally* provided that upon the failure of [the vendee] to comply with the conditions to be performed by him," the forfeiture should result, *and*:

> "Under such circumstances the proposed purchaser has an *option* to purchase, *without any obligation* beyond the fact that he is subject to the loss of his forfeit money if he does not complete the transaction."
>
> 26 Cal. App. 475-476.

In *Verstine v. Yeaney*, 210 Pa. 109, 59 Atl. 689, the court had under consideration a contract by which Yeaney agreed to sell and convey certain land to Stamey & Co. for a price payable one-half in six months from the date of the agreement, the balance in two equal annual installments; "and it is agreed that in case the said W. H. Stamey & Co. does not make the payment within the limits of the time specified * * * then this agreement to be null and void

and *all parties* to be released from *all liability* herein." The court said:

> "The agreement is *practically an option,* and was so regarded below. It is true it is an unconditional covenant on the part of Yeaney to convey, and there is *an agreement* on the part of Stamey & Co. *to pay,* but their agreement has attached to it—doubtless at their instance—a *proviso* that, if they do not make the payments at the time stipulated, they are to be *released from all liability.* The agreement in *Yerkes v. Richards,* 153 Pa. 646, 26 Atl. 221, 34 Am. St. Rep. 721, was substantially the same, and the condition as to failure to make payment similar. We declared it to be an option. Here Stamey & Co. never exercised their option by paying the first installment when it became due, and *by their voluntary default elected to say they would not take the property.*"
>
> 59 Atl. 690.

The terminology which the parties employ in their contract—while of importance in determining the nature thereof—does not in any case require a violation of the obvious intent with which it was used, even though more apt terms might be suggested for the expression of that intent. For example, see *Pittsburg, etc., Brick Co. v. Bailey,* 76 Kan. 42, 90 Pac. 803, where, though a contract was designated a *lease* and contained terms of demise, nevertheless it was by the court regarded as a mere *option* by reason of its containing a clause permitting the so-

called lessee to surrender the same, and a further clause to the effect that the failure to complete a certain oil well, or to make payment, would render the contract void after a lapse of two years. See, also, the case of *McConathy v. Lanham*, 116 Ky. 735, 76 S. W. 535, where the court held to be "a mere option" an agreement by landowners to sell which contained a clause to the effect that, if the consideration was not paid within the time stipulated, "this contract shall be null and void."

A case closely in point is that of *Williamson v. Hill*, 154 Mass. 117, 27 N. E. 1008. We quote the syllabus in the latter report, as follows:

> "Plaintiff sold defendant certain patent rights in consideration of annual payments which were to aggregate $250,000, upon condition that should any such annual payment become due, and should default in payment be made sixty days after demand, the contract should be null and void. It was stipulated that a single payment of $100,000 might be made in lieu of the annual payments, and that defendant might assign his rights under the contract, the same conditions to be binding on the assignee. *Held*, that the contract was terminable for the benefit of defendant as well as of plaintiff, and, where default has been made in payment, it cannot be recovered by suit, as the contract is then avoided for all purposes."
>
> 27 N. E. 1008.

In the case at bar, the clause *"all rights of* EACH of the parties hereunder shall forever cease and determine," can only mean the rights of the vendors as well as of the purchasers. To give it any other meaning, requires the court to read *out* of the contract the words *"each* of the parties" and to read *into* it the wholly contradictory expression, "the parties of the *second* part" [plaintiffs]. The present is a much stronger çase in this regard than *Williamson v. Hill, supra,* and is not distinguishable from *Ramsey v. West, supra,* nor, on principle, from *Gordon v. Swan,* 43 Cal. 564, *q. v.*

It is clear, therefore, that no absolute sale of the stock was made. By the contract's own terms, the sale and purchase were declared to be "upon * * * *conditions";* and one of those "conditions" was that upon default by plaintiffs in paying any installment *"all* rights of EACH of said parties hereunder shall forever cease and determine." It is impossible to suggest language that would point more unmistakably to the intention that, upon default, there should be effected *automatically*—that is, by the *terms* of the contract *itself,* and not by the *election* of the vendors—a wiping out of *all* rights secured thereunder to both parties. In precise phrase the contract defined the sole rights existing in case of default and the very steps to be then taken by the depositary in escrow, and ex-

pressly declared the non-existence of any other rights whatsoever.

A forfeiture is not favored by the law; and a forfeiture that can be invoked or not, according to the election of only one of the parties to a contract, should meet with especial disfavor, since it gives that party the further advantage (beyond such as is accorded by a simple forfeiture) of an election on his part to enforce either further performance or the forfeiture—accordingly as the one or the other may seem, at the time, to be the more profitable to him and, therefore, the more onerous on the other party. But where the forfeiture provided for is, in a manner of speaking, *compensated for* by having annexed to it the effect of wiping out all further rights and liabilities under the contract, there is less reason for viewing it askance. In other words, the party forfeiting gets some value for the money forfeited; whereas in the case of a forfeiture that may be exacted at the election of the other party, either the forfeiture is invoked (in which event he loses his money), or the performance of the contract is enforced (in which event he may stand to lose more)—and this without his being able, in most cases, to foresee what will be the result of his defaulting.

A purchaser may very well prefer to lose what he has already paid on a contract rather

than go on under it; and it is certain that he will always, if possible, so draft his contract that default in payment will terminate further liability. On the other hand, the vendor will always seek to frame the contract in terms giving himself the election either to enforce a forfeiture or to compel a performance. Without a word in the contract on the subject, the law would give him this election. (*Glock v. Howard, etc., Co.,* 123 Cal. 1.) Therefore, when the parties insert a provision as to forfeiture and the termination of all rights of *each* of them by the mere fact of defaulting in payment, it is reasonable to suppose that they intended thereby to assent to something different from what the law itself would have read into the contract in the absence of such a provision. The only other possible intent embraced within the meaning of the words here actually employed is that the forfeiture should be worked *by the terms of the contract itself*—not by the election of the vendor—the vendor yielding a point that, in the absence of the special stipulation, would have been his, and the purchaser gaining what would otherwise have been denied him. In other words, the forfeiture has some element of mutuality and is, therefore, not so abhorrent as is the ordinary forfeiture for lack of that quality.

The construction here contended for is not only reasonable, but it is the only construction

that gives their plain meaning, or any force whatever, to the words "thereupon" (*i. e.,* upon default in payment) "*all* rights of *each* of said parties hereunder shall forever cease and determine." This construction is the only one that would even suggest itself to the layman. Both parties to the contract acted upon it as the only tenable one—plaintiffs sending their telegram in reliance upon its correctness and explaining to the telegraph company that they had the right to terminate the contract by withholding payment; and Pitt and Campbell taking back their stock (as we shall see) without even suggesting that they had any claim against plaintiffs for the unpaid balance of $55,000.

If our interpretation be a reasonable one and the only one giving any force to the words declaring that upon default "*all* rights of *each* of said parties hereunder shall forever cease and determine," it must be given to them unless some rule of law forbids or invalidates stipulations of this nature; and it will hardly be pretended that any such rule exists. That defendant's contention is without merit must be apparent if we but ask ourselves: "What right of Pitt and Campbell was to cease and determine upon the default *except* it be the right they might otherwise have had *to enforce further payment?*" There could be no other possible right in the vendors; for the contract and the

escrow thereunder expressly secured to them the *right* to the return—not to say *actual return*—of their stock, and the *right* to the forfeiture, and the *actual forfeiture,* of all moneys previously paid. It was their *only remaining right*—to enforce further payment by plaintiffs—that the contract expressly declares to be non-existent after a default.

In 2 *Warvelle on Vendors,* p. 818, it is said:

> "But forfeitures are not and never have been regarded by the courts with any special favor; and where a party insists upon a forfeiture, he must make clear proof and show that he is entitled to it. It has ever been regarded as a harsh way of terminating contracts, * * * The right to declare a forfeiture is derived from the stipulation of the bond or agreement for conveyance, and is reserved ordinarily as an option on the part of the vendor, who upon failure of the vendee to comply with its terms may elect to declare the contract at an end."

The author, after recognizing cases of the class of *Wilcoxson v. Stitt,* 65 Cal. 596, proceeds as follows:

> "But while forfeiture, as a general rule, is a privilege of the vendor, to be exercised or not at his option, and the vendee is debarred from treating the contract as rescinded merely by a surrender of possession and a waiver of any further rights in the money previously paid by way of earnest or upon installments, yet the *wording* of the agreement relating to forfeiture may

under some circumstances *be construed to create mutual covenants that will extend this privilege to the vendee as well.* Cases of this kind are not difficult to imagine, and the books furnish us with precedents on which to base the rule. Thus, where by the terms of the agreement it is stipulated that upon failure to make payments as agreed, or if such failure continue for a specified time thereafter, all payments theretofore made should be forfeited, and the agreement shall thereafter be null and void, if default occur the contract, by its terms, comes to an end at the time limited. [Citing *Streeper v. Williams*, 48 Pa. St. 450.] A contract so worded has been held to create mutual covenants—the vendee in case of default agreeing to forfeit all moneys previously paid, and the vendor agreeing that thereafter the contract shall cease; or, in other words, in consideration of the vendee's agreement to forfeit the money which he shall have paid, the vendor agrees to accept that in full satisfaction of the agreement, and to release and discharge the vendee from all subsequent liability thereon." [Citing *Neill v. Peale*, 4 Atl. 830, Pa.]

2 Warvelle on Vendors, p. 821.

It is submitted that the case at bar is precisely in the category of those discussed in the foregoing quotation from Warvelle.

The present is not a case wherein ordinary property was the subject-matter of the contract, as in *Wilcoxson v. Stitt, supra* (city realty); but is one where the investment was of the

same hazardous nature as in *Gordon v. Swan, supra*, (a mine) and in *Williamson v. Hill, supra*, (patent rights), in the latter of which it was said that the purchaser's right under such a contract was to determine, from time to time, whether he would pay an additional installment and thus continue the contract in force for a further period, or whether he would forfeit what he had already paid, forego any rights to the property, and escape further liability.

In the western states, where mining is one of the chief industries, contracts are frequently met with for the purchase of mines or mining stocks on conditions very similar in form to those under discussion. The deeds or certificates are in each instance placed in escrow to await the issue of the transaction. An immediate or early payment of a more or less substantial sum is made, and it is provided that the balance shall be paid in installments at stipulated times. The aggregate of these installments, *i. e.*, the total purchase price, is usually very large, and bears relation rather to the optimistic estimate of the owner than to the visible worth of the property at the date of the contract. The prospective purchaser is willing to enter into such a contract because he reckons on paying the total price only in case the mine, on development or adequate prospecting, justifies the sanguine expectations of the

owner; and he has the interval between any two payments within which to determine, from such current development as may have a bearing on the value of the contemplated investment, whether he will keep alive his option or conditional contract of purchase by paying the next installment. If the mine turns out well, he pays an adequate consideration therefor. If it does not, he defaults in the payment of an installment; his forfeiture compensates for the privilege he has enjoyed; and the property is handed back to the vendor, to whom no injury results, since he not only retains the property he started with (and usually the improvements made by the prospective purchaser) but also all moneys paid on account prior to the default. It is plain, therefore, that there is no unfairness in construing such contracts in the manner here contended for, and as the Supreme Court of California construed a similar one in *Gordon v. Swan, supra.* Moreover, to adopt any other construction would be equivalent to prohibiting the investment in most mines of that capital without which their wealth must forever remain unavailable.

We submit, therefore, that plaintiffs had the right, *either* to keep the Pitt and Campbell contract alive by paying the installments from time to time as therein provided, and thereby finally to become absolutely entitled to the stock, *or* to

default in payment at any time and thus "forever" terminate *"all* rights of EACH of the parties" to the contract.

Counsel contend that the words of the contract—*"thereupon* all rights * * * shall cease" —do not relate to the default in payment, but to the return of the stock. [Petitioner's brief, pp. 64-65.] From this premise they reduce our construction of the contract to the absurdity of denying to Pitt and Campbell, upon plaintiff's default, even the right to the return of their stock, for the reason that such right was one that *thereupon* ceased. The difficulty that counsel seek to create in this respect grows out of a failure to differentiate between the reciprocal rights of plaintiffs and of Pitt and Campbell on the one hand, and the distinct rights secured, respectively, to Pitt and Campbell and to the bank on the other.

The default in payment gave instant rise to the duty of the bank to return the stock to Pitt and Campbell and contemporaneously forfeited past payments to them. But it is not to be lost sight of that the *bank's* duty in this regard arose *only under the terms of the deposit in escrow*—not under the Pitt and Campbell contract, to which the bank was not a party. True, the latter contract provided precisely what the terms of the escrow should be, and the oral escrow agreement and instructions followed the

pertinent provisions thereof. But they were distinct agreements, to the latter of which only was the bank a party. Therefore, in the use in the Pitt and Campbell contract of the phrase, "*thereupon* all rights of each of said parties hereunder shall forever cease and determine,"— we find nothing upon which counsel can base their attempted *reductio ad absurdum*. As between the parties thereto, *i. e.*, plaintiffs and Pitt and Campbell, all rights of *each*—of the former to purchase and of the latter to sell— ceased upon and by reason of the contemporaneous default and forfeiture. These were rights "*hereunder*." But the duty of the bank still subsisted under the oral escrow agreement. As depositary in escrow, the bank was the trustee of an express trust invested with duties the performance of which neither of the parties to the agreement for the deposit could forbid. (*Manning v. Foster*, 49 Wash. 541, 18 L. R. A. [N. S.] 337; *Cannon v. Handley*, 72 Cal. 133.) Moreover, Pitt and Campbell's right to the stock, *i. e.*, their ownership, did not *arise* under the contract, and it still subsisted though that contract was wiped out.

If the adverb "thereupon" refers to the moment of the return of the stock (as counsel argue) rather than to the moment of default in payment, then the adverb "theretofore," used in an identical construction in the phrase "all pay-

ments *theretofore* made shall be forfeited," must likewise refer to the moment of such return. This would entail the forfeiture of all moneys that might have come into the bank's hands even after the date on which a default had been made—an intent that cannot be attributed to either of the parties. For example, if plaintiffs made a payment on a day later than that on which it was required to be made under the contract, Pitt and Campbell could then, under counsel's view, elect to take back their stock and forfeit all payments *theretofore* made, *i. e.*, prior to the return of the stock, thus embracing in the forfeiture the very payment delay in making which constituted the default. Such an inequitable construction could not possibly be sustained, and to avoid it the word "theretofore" would be held to refer to the moment of default. Accordingly, the adverb "thereupon" must be held likewise to refer to the same moment.

In this connection, note that the word "thereupon" does not occur in the phrase providing for the forfeiture of all moneys paid by plaintiffs. If counsel's contention is correct, the right to the forfeiture could only arise upon the physical repossession of the stock by Pitt and Campbell. The contract, however, is explicit that a forfeiture occurs upon the mere default, and necessarily the determination of all rights

must take place at the same moment, since it is impossible to conceive of the parties agreeing that prior payments shall be forfeited and yet that plaintiffs' liability for future installments shall be kept alive until Fitt and Campbell actually receive from the bank the physical redelivery of the stock.

The forfeiture clause of the Fitt and Campbell contract is very different in its provisions from what counsel's purported synopsis of it would lead one to expect. [Petitioner's brief, p. [illegible].] According to counsel, the contract provides "that in the event of any default in payment the bank *shall be* authorized to return the stock." If this were true, it might possibly follow that the bank's authority was *to arise* in the future after default had been made, and was to be given by the vendor alone. The points of difference between the actual contract and counsel's synopsis are obvious, and are conclusively in favor of our construction. They are as follows: (a) The authority to return the stock is to be given "under the terms of the deposit in escrow" long *before* a default could possibly occur; (b) as between themselves, the parties to the contract unite in presently conferring that authority in this very instrument *before* even any escrow agreement was entered into; and (c) it is agreed that default in payment shall be the contingency in which that au-

thority shall be *exercised* by the bank—not as agent of either party, but as trustee of *both.* In view of these circumstances, how can it be said that *one* of those parties might vary the terms of the trust by forbidding the bank to do what both parties *preliminarily agreed* that the bank had authority to do in event of any default in payment?

Counsel seek to make some capital out of the fact that "the bank was not *directed* nor *compelled* to return the stock upon default in payment; it was only given *authority* to do so." [Petitioner's brief, p. 64.] When one person simply confers authority upon another to do an act for him, of course the principal (except in the case of a power coupled with an interest) can revoke the authority. But a depositary in escrow is not a mere agent; he is the *trustee of an express trust* with duties prescribed in advance by the escrow agreement, to which alone can he have recourse for his sailing instructions. If the two *cestuis que trustent* unit in an agreement that, in a certain event, the depositary "shall be authorized, and he is *hereby authorized,*" to pursue a definite line of conduct, and thereupon make the deposit in escrow under instructions so "authorizing" the depositary, neither *cestui* can revoke those instructions. (16 Cyc. 568.) The very essence of an escrow is that it is "beyond the control of the grantor for

all time." (*Id.*) What is thereafter to be done with it depends—not upon the will or election of either of the parties—but upon the happening of the contingencies provided for in the escrow instructions. A deposit subject to the subsequent instructions of the grantor is no escrow at all. Yet it cannot be doubted but that there existed an escrow in the case at bar.

It will not escape the court's attention that, at the date of the trial herein, any action on the contract by Pitt and Campbell against these plaintiffs had long since been barred by the statute of limitations. This circumstance bears a double aspect. Not only was it then impossible for Pitt and Campbell to maintain any action thereon, but their permitting the statutory period to run without seeking redress against plaintiffs indicates either an election to take back their stock or complete acquiescence on their part in the construction placed upon the instrument by plaintiffs, when they determined to abandon the contract by withholding payment. In *Mitau v. Roddan*, 149 Cal. 1, the court found it unnecessary to construe the contract before it, because of the practical construction placed thereon by the parties, "which," said the court, "is *controlling*" and "which renders it immaterial to consider what might be the literal construction of its terms." The court proceeds:

"It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is *alert to his own interests, and to insistence on his rights*, and that whatever is done by the parties contemporaneously with the execution [*i. e.*, the performance] of the contract is done under its terms as they understood and intended it should be. * * * The law, * * * recognizes the practical construction of a contract as the *best evidence* of what was intended by its provisions. * * * in any subsequent litigation which involves the construction of the contract, [the law] adopts the practical construction of the parties as the true construction and as the *safest* rule to be applied in the solution of the difficulty."

149 Cal. 14-15.

We do not notice counsel's suggestion, at page 85 of their brief, that the "vendor could not escape obligation to convey by failing to convey," further than to say that a contract which *neither* party is bound to perform is no contract at all, and that their supposititious case is not analogous to the one at bar. It is of the essence of any option that one party is bound and one is free. Here the obligation existed on the part of Pitt and Campbell to transfer the stock if plaintiffs elected to pay, and did pay, all of the installments. In fact, the deposit in escrow puts this matter, both legally and physically, beyond the control of the vendors.

(a) Distinction Between the Forfeiture Clause of the Pitt and Campbell Contract and the Clauses Involved in the Cases Cited by Defendant.

Counsel cite in this connection only those cases "which provide that upon such default [in payment] all the rights of the parties shall cease or such contract be void and of no effect." [Petitioner's brief, p. 70.] They are of no force herein because they merely enunciate the general rule as to forfeiture clauses, leaving untouched our contention that the terms of the present contract preclude its application.

The fact is that the words—"all rights of *each* of the parties hereunder *shall forever cease and determine*"—taken in their context, furnish the very degree of clarity, precision and certainty that the law requires in a forfeiture clause before considering it as intended for the benefit of *both* parties to the contract. They indicate *unmistakably* an intent that the clause shall be self-operating; and particularly must this be apparent when it is considered that the earlier portion of the paragraph in which they occur, by ordaining the future course of a *depositary in escrow,* renders it impossible for either party to have any right of election.

On the other hand, the expression,—"the contract shall be *void,*"—is equivocal, ambiguous, and therefore open to construction. *"Void"* is

frequently—nay, almost universally,—held to mean *"voidable"*; and when it occurs in a forfeiture clause where the contingency is default in payment, it is always so held in order not to impute to the parties the unusual intent that one of them may take advantage of his own default. The cases cited by counsel are all of this class; and yet they all recognize (as does the opinion herein of the trial court [Tr., p. 160-161]) *that there is no rule of law forbidding parties so to contract that the one defaulting may thereby bring the contract to an end for all purposes, provided apt and unambiguous words be used for that purpose.* Here plaintiffs have employed such apt terms.

In the case of *Cape May Real Estate Co. v. Henderson*, 231 Pa. 82, 79 Atl. 982, cited by defendant, the court in applying the general rule to the forfeiture clause there in question, says:

> "There is no covenant that the defendant should by his default be released from his obligation to pay, *nor that the rights of the grantor under the contract should cease.*"
>
> 79 Atl. 983.

The italicized words which the court failed to find in that case are present in the Pitt and Campbell contract in practical identity. In the clause "thereupon *all* rights of EACH of the parties hereunder shall forever *cease* and deter-

mine," there is no lack of precision, no ambiguity, nothing susceptible of construction. The only default mentioned in the contract is default in payment by plaintiffs. Both parties to the contract are separately mentioned in the selfsame paragraph in which this clause occurs. And yet in the face of this, the contract is particular to define the rights that are, upon such default, to cease and determine forever as "*all* rights of *each* of the parties hereunder."

We attach some importance to the expression, "shall *forever cease and determine*." There is a sense of finality therein that is absent from any such clause as, "the contract shall be *void*." "*To cease*" is "*to come to an end*." "*To determine*" carries the idea of cessation a little farther, and means,—"*to reach a set limit or termination; to cease to be; hence, to lose binding force*." A "*limit*" is "*a line, point or boundary beyond which whatever is bounded ceases to extend, avail, operate, etc*." "*Termination*" is defined as "*a limit in point of time; an end of continuance or duration; close; end*." A "*set*" limit or termination is one "*established by authority or agreement; prescribed; ordained; appointed*." (Standard Dictionary.) The adverb "*forever*" emphasizes this finality. It means "*throughout eternity*," or in the present context, to be more exact, it means "*thenceforth throughout eternity*." Can a limit or termina-

tion of rights be said to be "set," when after the happening of the contingency on which it depends, it may be declared by one of the parties, at his whim, to constitute *no* termination of *his* rights?

The case of *Wilcoxson v. Stitt*, 65 Cal. 596, cited by counsel, is clearly distinguishable. That was a case of an agreement for the sale of land wherein the purchaser paid one-half of the price and agreed to pay the balance by a certain day. It was provided that "in the event of failure to comply with the terms and all the conditions hereof by the [purchaser, the vendor] shall be released from all obligations * * * to convey said property * * * and the [*purchaser*] *shall forfeit* all right thereto, and this agreement shall be *void*"—after which followed a provision whereby the vendor, "on receiving such payments, at the time and in the manner above mentioned," obligated himself to convey. The vendor, on default in payment, sued to recover the balance mentioned. This action was sustained, the court holding that the provision as to default gave the vendor the option either to avoid or to enforce the contract.

It will be noted that in the *Wilcoxson case*, the terms of the contract expressly released the *vendor*, on the purchaser's default, from the obligation to convey and forfeited the latter's

right to the property. It was natural, therefore, to read the further provision—that "this agreement shall be *void*,"—in the light of those particular stipulations and to hold that it really meant *"voidable"* by the party whose obligations in the premises were released by the other's default. By so construing the contract, every portion of it would, in conformity to the elementary rule, be given some effect; whereas, if the clause,—"this agreement shall be void," —were construed literally, the clauses releasing the vendor from the obligation to convey and forfeiting the purchaser's right to compel a conveyance, would be rendered superfluous and of no effect whatever, in that the same ground would have been covered by the clause avoiding the agreement. And it is common learning that the word "void" is frequently used, where the term "voidable" would be the exact expression of the idea it is intended to convey.

The case of *Stewart v. Griffith,* 217 U. S. 323, is in the same category as *Wilcoxson v. Stitt, supra.* The opinion therein is based wholly upon the *indicia,* contained in the contract, of an absolute obligation upon the purchaser's part to take the land and pay the price therefor. The court says:

> "But in this case we are not confined to a mere implication of a promise from the penalty. The tenor of the 'agreement'

throughout imports mutual undertakings. The $500.00 is paid as 'part purchase price of the total sum *to be paid;*' that is, that the purchaser agrees to pay. The land is described as '*being sold.*' There are *words of present conveyance,* inoperative as such, but implying a concluded bargain, like the word 'sold' just quoted. So one-half of the purchase price 'is to be' divided and the notes secured by *mortgage 'to be given;'* and in the case of the burial lot, Ball [the vendor] '*shall have paid* to him' $40.00 if he elects to abandon it. Here is an absolute promise in terms, which it would be unreasonable to make except on the footing of a *similar promise* as to the main parcel that the purchaser desired to get. We are satisfied that Stewart [the purchaser] bound himself to take the land. * * * This being so, the word 'void' means voidable at the vendor's election, and the conditions may be insisted upon or waived at his choice."

217 U. S. 327.

The same may be said of each of the cases cited by petitioner at page 79 of its brief. None of them is distinguishable on principle from *Wilcoxson v. Stitt, supra,* or *Stewart v. Griffith, supra,* and it is therefore unnecessary to note such variance as there may be in the terms of the several contracts therein under consideration. In some of them, however, the *indicia* of an absolute obligation on the part of the purchaser are more pronounced than in the cases last cited. Thus, in McMillen v. Strange, 159 Wis. 271, in addition to an absolute promise

to pay the purchase price of the stock which was the subject-matter of the contract, there were provisions for the giving of security therefor, for the immediate execution of an assignment of the stock to the purchaser, for the payment of interim dividends to him, and for the giving of irrevocable proxies enabling the purchaser to vote the stock during the period of the escrow thereof provided for by the contract.

The case at bar is much more like the case of *Gordon v. Swan*, 43 Cal. 564, and *Williamson v. Hill*, 154 Mass. 117, 27 N. E. 1008, and is indistinguishable on principle from the cases cited herein in support of plaintiffs' construction, particularly the case of *Ramsey v. West*, 31 Mo. App. 676.

It is plain that the provision as to default in payment was inserted for the very purpose of allowing plaintiffs to withdraw from a hazardous investment at any time, and by so withdrawing, to free themselves from all possibility of loss beyond what they had already paid the vendors. If, by defendant's gross negligence, plaintiffs were hindered from taking advantage of a condition of the Pitt and Campbell contract of which they desired to avail themselves, they are entitled to recover the amount of the benefit they would have obtained if they had not been so hindered. (*Gray on Communica-*

tions by Telegraph, Sec. 82.) That benefit was the saving of $11,250, which, as is found, would not have been paid to Pitt and Campbell, but for defendant's failure to deliver the telegram *as specially agreed* in consideration of the payment of an *extra compensation*.

V.

The Finding That Plaintiffs Made No Further Payment Under the Pitt and Campbell Contract, but Abandoned It and Forfeited All Moneys Paid Thereon, Constitutes a Finding That Pitt and Campbell Exercised Their Right of Election (If Any) in Favor of the Forfeiture.

The court found:

"That plaintiffs did not make any further payments on the purchase price of said shares of stock * * * but abandoned said contract with said Pitt and said Campbell and forfeited and lost all moneys paid thereon." [Finding XVII, Tr., p. 60.]

Also:

"that by reason of defendants' gross negligence in failing to transmit and deliver said message immediately * * * plaintiffs suffered damage and loss in the amount of the value of said draft." [Finding XX, Tr., p. 61.]

There was evidence in the case which would have sustained an explicit finding that Pitt and Campbell had elected to take back their

stock on plaintiffs' default. But apart from that, if, as a matter of fact, plaintiffs made *no* further payments but *abandoned* the contract and *forfeited* all moneys paid thereon, then Pitt and Campbell *must necessarily* have elected to take back their stock (assuming they had any option at all). The ultimate fact was the forfeiture; the probative facts were the default in payment and such election to retake the stock, and, of course, the ultimate fact only need be found. Accordingly, although counsel's contention that there was "no evidence that the stock had ever been returned to Pitt and Campbell, or that they had ever demanded its return" [Petitioner's Brief, p. 66], cannot be presented on the record herein, it would not be sustainable even if the argument were directed against the sufficiency of the findings.

Surely defendant is controlled herein by what Pitt and Campbell *actually* did—assuming that they had any election,—and not by what they *might* have done, but did not in fact do. When they worked the forfeiture of the moneys already paid, plaintiffs suffered as much by defendants' negligence as though they had had (in conformity to our contention) the absolute right to withdraw from the contract.

Though the fact that the stock *was* returned to Pitt and Campbell, is necessarily involved in the finding of the abandonment and forfeiture,

plaintiffs are really not concerned with what happened *as between the bank and the vendors,*—the important points being that further payments were *not* made by them, and that they *abandoned* the contract and suffered a *forfeiture,*—all of which is covered by both evidence and findings.

But even though there were no such finding of forfeiture, if Pitt and Campbell could have elected under the contract either to work a forfeiture or to enforce further payment by plaintiffs, the judgment rendered in plaintiffs' favor is nevertheless proper, in view of defendant's failure to show, as an affirmative defense, that such election in fact was made in favor of the enforcement of payment. In *Vito v. Birkel,* 209 Pa. 206, 58 Atl. 127, it is held that, under the ordinary forfeiture clause, no affirmative election by the vendor to forfeit the contract, upon the vendee's default in payment, is necessary.

VI.

The Judgment Herein, as Modified, Properly Includes Interest From the Date of Plaintiffs' Claim of Loss.

(a) The Damages Claimed, Namely, the Amount of the Draft, Constituted a Liquidated Demand.

Plaintiffs' loss, due to the failure of defendant to transmit to the bank their telegraphic

instructions not to pay the draft originally designed by them for application on the Pitt and Campbell contract, is measured by *the amount of money which was paid contrary to their desire;* and no other element whatever enters into the determination of the amount of that loss. This is not a case wherein plaintiffs, having paid for and received an article not having an ascertainable value, sue for the difference between its value and the price paid as a result of defendant's failure to intercept their remittance. Such a state of facts would, of course, present a typical case of an unliquidated demand. On the contrary, *plaintiffs received nothing* under the Pitt and Campbell contract. When they determined to withdraw therefrom, they had made an initial cash payment of $7,500 and had forwarded the draft in question to meet the second of the seven installments. On discovering that the mining stock was valueless, they endeavored to prevent the payment of that installment and thus to confine their loss to the original cash payment. This they were entitled to do, and for that purpose they contracted with defendant *immediately* to transmit and deliver their telegram,—*defendant* INSURING *such immediate transmission and delivery for an extra compensation.* [Findings X and XII, Tr., pp. 52-53, 56.] Defendant negligently delayed the transmission of the message for three days,

with the result that defendant's loss on the Pitt and Campbell contract, instead of being restricted to $7,500, was increased by the amount of the draft, that is, to $18,750. Plaintiffs, of course, made no further payment under that contract. They forfeited the $18,750 [Findings XVII, Tr., p. 60; p. 103] and the Lyon County Bank, pursuant to the terms of the contract, was required to return and did return the stock to Pitt and Campbell.

It is apparent, therefore, that the actual value of the Pitt and Campbell stock does not enter into the question of the determination of plaintiffs' loss. *They were not entitled to the stock unless they elected to make, and did make, full payment.* They were at liberty at any time to elect not to take the stock by failing to make further payment, and their withdrawal from the contract might be for any reason which to them seemed sufficient.

The court found the stock to be in fact valueless. [Findings XVIII, Tr., p. 60.] But suppose the fact were otherwise,—would plaintiffs' loss, by reason of defendant's failure to transmit and deliver the telegram in due season, have been reduced one cent? An answer in the affirmative would presuppose that plaintiffs received the stock under their contract,—which is contrary both to the fact and to the terms of the agreement.

Plaintiffs sought by their telegram,—not to take a step by which would be fixed only one of the terms of an equation for determining their loss,—but to put an end to further responsibility by defaulting in payment and thereby forfeiting $7,500 before the payment of their draft would increase the forfeiture they were bound to suffer to $18,750. Their loss was the amount of the draft,—not that amount less some other figure, definite or indefinite,—and it was so expressly found by the lower court. [Finding XX, Tr., p. 61.] Eliminating the initial payment to Pitt and Campbell, the only inquiry necessary or permissible in order to determine the detriment to which they were subjected by "defendant's gross negligence in failing to transmit and deliver said message immediately, as by it agreed" [Finding XX, Tr., p. 61] is,—"What would have been plaintiff's loss if defendant had faithfully performed its contract for the immediate transmission and delivery of the telegram?" Plainly the answer is,—"There would have been *no* loss." The value of the mining stock is a wholly false quantity in the case. It was touched upon at the trial, but it has no legitimate place herein except as bearing upon the quality of the information on which plaintiffs acted in withdrawing from the Pitt and Campbell contract and upon their good faith in so doing.

As plaintiffs were entitled to recover damages *certain in amount*, and as the right to the recovery thereof was vested in them at least as early as the date of the filing of their claim with defendant (June 26th, 1907), it follows that the judgment was properly modified so as to include interest. (Civil Code of California, Sec. 3287.)

We regret that we are unable to present to the court in this connection any authority, precisely in point, illustrative of our contention. Search for such an authority has been in vain, and we can only surmise that our failure in this regard may be due to the fact that, by common understanding in the profession, such a demand as that here in question is conceded to be liquidated.

(b) Even If the Demand Herein were Unliquidated, Defendant's Repudiation of All Liability Would Render Inapplicable the General Rule Denying Interest Thereon.

In *Bernhard v. Rochester German Ins. Co.*, 79 Conn. 388, 65 Atl. 134, it is said:

> "Courts are more and more coming to recognize that a rule forbidding an allowance for interest upon liquidated damages is one *well calculated to defeat* that purpose [*i. e.*, to make fair compensation] in many cases, and that *no right reason exists for*

drawing an arbitrary distinction between liquidated and unliquidated damages. * * * The determination of whether or no interest is to be recognized as a proper element of damage is one to be made in view of the *demands of justice* rather than through the application of any *arbitrary* rule."

65 Atl. 137.

This passage is quoted with approval in 1 *Sedgwick on Damages* (9th ed.), Sec. 315. To the same effect is

Southern Pacific Co. v. Arnett, 126 Fed. 75, 80.

See also:

Nashua, etc. R. R. Corp. v. Boston, etc. R. R. Corp., 61 Fed. 237, 250-251;

Consaul v. Cummings, 222 U. S. 262, 272-273;

Spalding v. Mason, 161 U. S. 375, 395.

In California, express statutory enactment puts the matter to a certain extent, beyond the reach of judicial construction. By section 3287 of the Civil Code, it is provided:

"Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, * * *."

But even in California doubt has been expressed whether interest should *always* be dis-

allowed on unliquidated demands. Thus in *Cox v. McLaughlin,* 76 Cal. 60, the court says:

> "We are *not* prepared to say, in general terms, that no interest in any case can be recovered in an action upon contract for an unliquidated demand. * * * in this state interest is allowable on such demand *under some circumstances.*"
>
> 76 Cal. 71.

And in *Mix v. Miller,* 57 Cal. 356, a creditor was held entitled, under section 3287 of the Civil Code, to interest upon a demand that included, as one item, the *reasonable value* of services rendered in making a search and abstract of title,—clearly an unliquidated sum.

The basis for the rule denying interest, in ordinary cases, on unliquidated demands, is thus stated in *Cox v. McLaughlin, supra,*

> "The reason of such denial of interest is said to be that the person liable *does not know* what sum he owes, and therefore can be *in no default* for not paying."
>
> 76 Cal. 67.

"When the reason of a rule ceases, so should the rule itself." (Civil Code of California, Sec. 3510.) Where the debtor's failure to settle is, *in truth and in fact,* based upon his inability to determine the *amount* justly due from him, and he shows this to be so by an effort to adjust that amount as between himself and

the claimant, the rule denying interest,—so long as it remains upon the statute books,—should be applied. He then is not in default because, while admitting a liability, "he does not know what sum he owes." But where the person upon whom the claim is made, instead of admitting responsibility and discussing the amount of loss, *denies* all responsibility, the reason for the rule does not exist. He takes it upon himself *to decide that he owes nothing*. He assumes to *know*. He is not withheld from making a tender because he cannot determine the *amount* of his liability. On the contrary, he denies *all* responsibility and is determined to resist any payment whatsoever. Should *he* be shown the tender regard accorded to the man who admits a just liability, but who honestly differs from the claimant as to the amount thereof? If so, not only does the claimant suffer by being deprived during the period of litigation, without compensation, of the use of the money justly due him, but a *direct inducement* is offered every person from whom a demand is owing *to abstain from adjusting and paying the amount thereof,* in order that he may have the use, during that period, of the money which he must ultimately pay. Such a holding would be subversive of the policy of the law to encourage the private settlement of differ-

ences. At the time of judgment, the debtor will, by its terms, be required to pay no more than, in fair dealing, he should have paid at the time the claim arose,—perhaps years before.

Particularly apparent is the absence of the reason for the rule disallowing interest, when defendant denies all liability *and* the award that is by the judgment made to the claimant, is *precisely the sum by him named in his demand.* Then, surely, the defendant is in no position to plead his ignorance of the amount due him in order to escape liability. The event proves the demand to have been a just one which he should have paid, but which he refused to pay either in whole or in part. He who denies a liability *in toto* puts himself in default if, by the judgment, it be proven that in law the liability existed and that it was for an amount accurately measured by the demand; and he should not be permitted to assume a dual role by first *repudiating* responsibility, and, on that responsibility being fastened on him, by then claiming exemption from the payment of interest on the ground that he could not be in default *since he did not know what sum he owed.* (1 *Sedgwick on Damages,* [9th ed.], Sec. 314, citing and quoting *Gray v. Van Amringe,* 2 W. & S. 128.)

The amount awarded plaintiffs herein was the identical sum claimed by them in their written demand on defendant, which demand—so far as regards any action looking to its settlement in whole or in part,—was first totally ignored and then repudiated by defendant. Where there is a duty incumbent upon the person liable, to liquidate a claim, his repudiation of liability and his refusal to liquidate entitle the claimant to interest from the date of such repudiation and refusal. (*Bernard v. Rochester German Insurance Company*, 79 Conn. 388, 65 Atl. 134.)

See also:

White v. Miller, 78 N. Y. 393, 399;

City of Louisville v. Henderson's Trustee, 11 Ky. L. Rep. 796, 13 S. W. 111, 112;

Schmidt v. Louisville, etc. Ry. Co., 95 Ky. 289, 26 S. W. 547;

Western Union Tel. Co. v. Carver, 15 Tex. Civ. App. 547, 39 S. W. 1021;

Kohlberg v. Havens, 182 Pac. 467, 469 (Cal. App.).

In *Fairchild v. Bay Point etc. Ry. Co.*, 22 Cal. App. 328, the contract sued on provided that certain work should be paid for by the reimbursement of plaintiffs for its cost and adding ten per cent thereto. Respecting interest on the demand, the court said:

> "Nor would the fact that the defendant *denied the amount* of the cost charged against it, *if the court found against defendant's contention,* deprive the plaintiff of the right to recover interest."
>
> 22 Cal. App. 331.

In the case at bar, defendant did not merely dispute the *amount* of an admitted liability. On the contrary, it denied *all* liability. It is unnecessary to cite the particulars of its recalcitrancy as exhibited by the evidence. Suffice it to refer to its answer to plaintiffs' complaint, wherein it repudiated all responsibility (1) by denying any special contract with, or the payment of an extra toll by, plaintiffs, (2) by taking refuge behind the stipulations on the message blank, and (3) by endeavoring to shift the blame to the connecting telephone company. [Tr., pp. 29-32, 34-35, 36.] At the trial, no evidence of values was introduced, but only the testimony of one of the owners of the stock that, *in his opinion,* the same was more valuable than the amount that remained payable under the Pitt and Campbell contract after the application of the draft thereon. The court found, contrary to this opinion evidence, that the stock was practically valueless. [Finding XVIII, Tr., p. 60.]

The record demonstrates that this is a case,—not where defendant was in ignorance, as a

matter of *fact*, of the *quantum* of its liability,—but where defendant, as a matter of *law*, denied *all* responsibility. Ignorance of the law is no excuse; and when defendant seeks to justify itself *in point of law alone*, it hardly lies in its mouth to claim an exemption from the payment of interest upon the ground that the demand, being unliquidated in point of *fact*, defendant could not know what sum it owed plaintiffs.

It might be further contended by plaintiffs (on the authority of certain of the cases), that even if the worthlessness of the mining stock which was the subject-matter of the Pitt and Campbell contract, were an element entering into to the determination of plaintiffs' loss,—which, however, we deny,—such worthlessness "*could reasonably be ascertained by due inquiry and investigation*," and that, "whatever may be true under other circumstances, the wrongdoer who neglects to ascertain it ought, in fairness, if it becomes necessary to sue for compensation, to be made to pay, not only what was thus originally due, but also damages for his delay in not paying it without judicial compulsion." (*New York etc. Ry. Co. v. Ansonia Land and Water Co.*, 72 Conn. 703, 46 Atl. 157, *per* Baldwin, J.) By the term "damages" the court there referred to interest.

So, also:

Schmitt Bros. v. Boston Insurance Co., 81 N. Y. Supp. 767, 770;

Van Rensselaer v. Jewett, 2 N. Y. 136, 140;

Loomis v. Gillett, 75 Conn. 298, 53 Atl. 581.

Authority might also be cited to the proposition that "the allowance of interest on plaintiff's claim from the time of the *commencement of the suit* although the amount was *then unliquidated*," would in any event have been proper. (*McCollum v. Seward*, 62 N. Y. 316.) However, we do no more than to suggest these considerations.

By no means do plaintiffs consider that they are here required to combat either the general rule denying interest on unliquidated demands, or the application of that rule to cases in which the difference between the parties is one of *liability or non-liability*, instead of one merely respecting the amount of an *admitted* liability. Plaintiffs stand squarely upon the indisputable ground that theirs was a *liquidated demand*, and that the only question ever open to dispute between the parties, was whether the defendant was originally liable for $11,250.00 or

for nothing. This was the amount of the draft paid contrary to plaintiffs' wishes, as expressed in the delayed telegram, and it was so paid through defendant's failure *promptly* to transmit and deliver that message under a *special contract* by which defendant, *for a special consideration, insured promptness.* Plaintiffs received nothing whatever under the Pitt and Campbell contract,—in fact, *could* receive nothing except on full payment thereunder,—and, by its terms and in fact, they forfeited everything they had paid thereon. *Their loss was exactly the amount of the draft,* and not even a computation was required to determine the same. No question of offset as against that loss is present in the case, *since no benefit*—liquidated or unliquidated,—*accrued to plaintiffs.* We submit, therefore, that plaintiffs are entitled to interest upon their demand from the date of filing their claim in writing with defendant. This is their due, both under section 3287 of the Civil Code of California, and also under that rule of law by which is raised in defendant an implied promise to pay interest. (*Curtis v. Innerarity,* 6 How. 146, 154.)

Conclusion.

The propositions whereon rests plaintiffs' right to recover herein, have, as we think, been demonstrated. Under their contract with Pitt and Campbell, plaintiffs had the absolute right, by withholding any one of the payments therein specified, to terminate said contract and "*all* rights of *each* of the parties" thereunder. This they sought to do by means of the telegram in question. But even if they had no such right, since it is found that they made no further payment but forfeited all moneys paid thereon and abandoned the contract, and since this is tantamount to a finding that Pitt and Campbell exercised any right of election *they* may have had by declaring a forfeiture, plaintiffs' situation herein is the same as though the termination of the contract had resulted from their exercise of a power given to themselves.

Through gross negligence, defendant delayed for three days the message designed by plaintiffs to intercept payment on their draft, and from such delay plaintiffs suffered a loss in the amount of said draft. Defendant's liability for this loss rests,—not merely on the duty by law imposed upon it to use great care in transmitting and delivering telegraphic messages entrusted to it, and not at all upon any contract supposed to be constituted by the terms printed

on the message blank,—but on a *special contract of insurance* whereby, for a consideration *in excess* of its ordinary tolls, defendant undertook to indemnify plaintiffs for the consequences of any delay. Hence, the stipulations for the limitation of defendant's liability printed on the message blank, have no proper place in the case, for they constitute no part of the contract by the trial court found to have been actually entered into.

But were it otherwise, plaintiffs would still be entitled to recover. Defendant's negligence was found to have been "*gross*"; and from liability for such negligence, a telegraph company cannot, by stipulation, exempt itself to any extent. Moreover, as properly construed, the stipulations on the message blank do not militate against plaintiffs. Thereby a *written* contract is required *only* when the insurance of the message is against *errors in transmission*,—as distinguished from *delays* therein or in delivery.

Under defendant's regulations, the insurance of a message necessarily embraces an order for its repetition. Hence, plaintiffs' was both a "specially insured" and a "repeated" message, according to defendant's classification of telegrams on its message blanks. Yet, as a matter of fact, defendant made no effort to repeat it.

Again, even if the message had not been, in effect, "ordered repeated," the clause of the stipulations limiting defendant's liability for unrepeated messages would avail it nothing. Repetition is an act that, in its nature, lends itself only to the detection and correction of *errors in transmission.* It therefore can have no efficacy to prevent *delays* in transmission or delivery except such as are due to *errors in the address* of the telegram. Plaintiffs' message was correctly transmitted in all respects, and to apply this stipulation so as to exonerate defendant from liability for a delay due to causes which compliance with its terms would have no tendency to overcome, would render it arbitrary and unreasonable and, to that extent, invalid.

The stipulation of non-liability for messages forwarded over connecting lines,—even if properly in the case at all,—is ineffectual to exonerate defendant, because the whole delay occurred on defendant's own lines, and not on those of the connecting company. In any event, the special contract of insurance comprehended defendant's responsibility as insurer for defaults of the connecting line.

Finally, as plaintiffs' loss was the precise amount of the draft without deduction therefrom of any sum whatsoever, it was a liquidated

demand whereon the judgment, as modified, properly allowed interest.

Upon the foregoing grounds and upon the authorities herein cited, it is urged that the judgment as modified by the Circuit Court of Appeals, should be affirmed.

Respectfully submitted,

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